Litton Microwave Cooking Products, Division of Litton Systems, Inc. *and* United Electrical, Radio and Machine Workers of America (UE). Cases 18–CA–7065, 18–CA–7325, 18–CA–7402, and 18–CA–7573

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 12, 1984, Administrative Law Judge David L. Evans issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief; the Charging Party filed cross-exceptions and a supporting brief. The Respondent filed an answering brief to the Charging Party's cross-exceptions and the General Counsel's exceptions; the General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The Respondent manufactures microwave countertop ovens at its Sioux Falls, South Dakota plant. Its production and maintenance employees had been represented by the Union since September 19, 1980,[3] when it was certified pursuant to a Board election conducted September 11, 1980. As of the date of the hearing in this proceeding, the Union and the Respondent had yet to negotiate a contract concerning the Sioux Falls employees. The instant complaint alleges that the Respondent violated Section 8(a)(5) and (1) during its initial contract negotiations with the Charging Party commencing October 7, 1980. The complaint also alleges violations of Section 8(a)(3) and independent violations of Section 8(a)(1) during the 17-month period of negotiations.

The judge found numerous violations of Section 8(a)(5), (3), and (1) of the Act and dismissed other allegations. For reasons discussed below, we are not in full agreement with all these findings. Most significantly, we disagree with the judge's finding that the Respondent during the 53 session, 17-month-long course of negotiations engaged in surface bargaining in violation of Section 8(a)(5) and (1).

I. THE 8(A)(1) ALLEGATIONS

The judge found that the Respondent violated Section 8(a)(1) by the actions described below. We agree with these findings for the following reasons.

1. The judge found that the Respondent violated Section 8(a)(l) when Supervisor Jackie Moeller, 2 weeks before the election, told employee Mark Hubert, ''I hear you have been talking to people on company time and I respect your right to talk to people about the Union but don't do it on company time.''

The judge reasoned that the proscription about talking on ''company time'' was overly broad because the employees received two paid breaks per day. He further found that Moeller's statement constituted a discriminatory no-solicitation rule because undisputed testimony showed that employees were otherwise permitted to talk about anything during working time.

We agree that the statement was a discriminatory rule and on that basis adopt the judge's finding that Section 8(a)(1) was violated. We further agree that Moeller's proscription was overly broad. See *Hoyt Water Heating Co*., 282 NLRB 1348, 1357 (1987), and cases cited therein, holding that ''company time'' could reasonably be construed as encompassing both working and nonworking time spent on the company premises.

2. The judge found that Supervisor Roger Kozel unlawfully interrogated employee Silvia Dunkelberger in August 1980. He found that at the end of a performance review discussion in Kozel's office, Kozel told Dunkelberger that he would like to talk about the Union, that he wanted Dunkelberger to give her views, and that Kozel would then give his. Dunkelberger indicated she would rather not, but after Kozel repeated his request three times, she relented and related several employee complaints about terms and conditions of employment. Kozel then told them about several negative experiences he had had with unions. Dunkelberger was an active union supporter who eventually was the first president of the local involved here, Local 1180.

Subsequent to the judge's decision, the Board issued its decision in *Rossmore House*,[4] in which it reaffirmed the ''totality of the circumstances'' test to determine whether interrogations of employees are unlawful. Applying that test, we agree with the judge that Kozel's interrogation of Dunkelberger violated Section 8(a)(1) of the Act. Thus, the interrogation was conducted in Kozel's office at the end of a performance review discussion and Kozel persistently urged Dunkelberger to express her views about the Union in

[1] The General Counsel and the Union have each excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Charging Party's request for attorney's fees and payment to its negotiators is denied.

[3] The judge inadvertently stated the certification occurred in 1981.

[4] 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

spite of the fact that Dunkelberger told him that she would rather not talk about the Union. In these circumstances, Kozel's questioning cannot be viewed as the normal sort of interchange that can be expected in the workplace and ''the place and method of interrogation''[5] in this case both render the interrogation unlawful. Instead, Kozel's comments had a tendency to interfere with the employee's Section 7 rights.

3. The judge found that again in November 1980 the Respondent violated Section 8(a)(1) when Supervisor Judy Klaus directed employees not to talk about the Union in work areas and threatened disciplinary action if they did so. He found that group leader Judy Jungen and the other employees on the ''white line'' talked regularly about any topic while working on the line. In late November, however, Klaus told Jungen and two other group leaders that ''she knew the Union was being talked about on the line'' and ''she wanted it to stop or that disciplinary action would result.'' The three group leaders relayed the message to other employees, with Jungen herself telling 10 employees.

The judge found that Klaus' instruction was overly broad, and, coupled with the warning of discipline, violated Section 8(a)(1). We find that Klaus' instruction was discriminatory because talk on other topics while employees were working was tolerated. On this ground, we agree with the judge's conclusion that the instruction and warning violated Section 8(a)(1). In so doing, we find it unnecessary to rule on whether the rule pronounced was overly broad.

4. The complaint alleged that the Respondent violated Section 8(a)(1) on two occasions by threatening employees with discharge for leafleting in the lobby of the Respondent's plant 45 minutes before starting time, and by its chief negotiator Mathias Diederich's threatening employees on April 8, 1981, with suspension if leafleting in the lobby continued. The judge dismissed these allegations because he found that the lobby was a work area for the guards between 6:30 and 7 a.m., just before the first shift started. (The Charging Party's exception to the dismissal of the allegation concerns only the April 8 statement.) We agree with the judge's conclusion.

The uncontroverted evidence shows that the lobby is a relatively small area no wider than the two doors on each side through which all the employees (approximately 580) pass on their way to work. During the half hour before work begins, the guards stationed in the lobby check badges, issue temporary badges, answer telephone calls from employees calling in sick, and check for employees with obvious physical injuries. According to the undisputed testimony of Security Supervisor Wibbin, on January 28, 1981, when the first incident of union leafleting occurred, employees entering the lobby stopped to read and talk about the leaflets there. Because of the noise level, Wibbin had difficulty performing his duty of answering telephone calls of employees reporting that they would be absent because of illness. There is evidence, therefore, that the leafleting not only had the potential to interfere, but also actually did interfere, with the guards' work.

Diederich's April 8 statement threatening suspension for further leafleting in the lobby was clearly directed to leafleting occurring at the time when the lobby was a work area for guards. Not only did the two incidents of leafleting occur at this time of day, but also there is no evidence that the Union attempted to leaflet in the lobby at any other time of day. We therefore conclude that the judge correctly found that Diederich's statement was not unlawful.

II. THE 8(A)(3) AND (1) ALLEGATIONS

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by issuing warning notices to employees Judy Lawson, Mark Hubert, and John Hassara on April 21, 1981, and further warning letters to Lawson and Hubert on April 22, to the extent these second warning letters disciplined Lawson and Hubert for their disregard of the instructions of the secretary to Director of Operations Michael Dolen to wait before entering his office.

These three employees had gone with other employees into Director of Operations Michael Dolen's office during their break on April 21 to protest certain terms and conditions of their employment and the lack of progress in negotiations. When the buzzer sounded, indicating that the break would end in 2 minutes, all the employees but these three went back to work. The three remained and talked with Dolen and Materials Manager Richard Ori for several minutes after the break had ended. They returned to work after Ori asked if they were not supposed to be at work. Dolen later informed Production Superintendent Lorie Johnson that he had not approved the three employees' late return from lunch. At Dolen's instruction, the three employees received warning notices and were docked for their 14 minutes time off. On April 22, the Respondent issued second warning letters to Lawson and Hubert for disregarding the instructions of Dolen's secretary on April 21 to wait before entering his office and for their refusal to correct their timecards to show the 14 minutes past their break period when they continued to speak to Dolen and Ori.

The judge found that by continuing the conversation with the three employees after the warning buzzer, without indicating that their staying was impermissible, Dolen was creating a ''set up'' for the employees to be disciplined. He concluded that the initial warnings, therefore, violated Section 8(a)(3) and (1). He further

[5] Ibid., 269 NLRB at fn. 20. See also *Baptist Medical System*, 288 NLRB 882 at fn. 2 (1988) (questioning of known union supporter in supervisor's office coercive).

reasoned that the employees, by not returning to work at the end of their lunchbreak, were withholding labor in protest of working conditions and, thereby, engaging in strike activity protected by Section 7. Citing *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 10–17 (1982), he concluded the Respondent's discipline of the employees for this conduct violated Section 8(a)(1) on this basis as well.

We agree with the judge that the initial warnings violated Section 8(a)(3) and (1). In agreeing, we find that Dolen's conduct at the April 21 meeting is more accurately described as a condonation of the employees' late returns from lunch than as a ''set up.'' The discussion did not involve personal matters and Dolen's acquiescence in their staying beyond the buzzer was tantamount to his giving them permission not to report back to work as long as their conversation with him lasted. The situation is, therefore, distinguishable from a strike, which does not involve employer condonation or participation. We, accordingly, do not rely on the judge's alternative basis for finding a violation that the employees were involved in strike conduct, or on his reliance on *NLRB v. Washington Aluminum Co*., supra.

The judge further found that although the Respondent could not lawfully punish the employees for their late returns, it could require that they receive no pay for the time spent in exercising their Section 7 rights. He, therefore, concluded that the Respondent did not violate Section 8(a)(3) and (1) to the extent that the second warning notices to employees Hubert and Lawson disciplined them for refusing to correct their timecards to show the time spent in conversations with Dolen and Ori. We disagree. As found above, Dolen in effect gave the two employees permission to stay past the end of the break period to continue the discussion with him. Further, because employer condonation or participation is involved, the employees' conduct did not amount to a strike. In these circumstances, we find that they were entitled to be paid for the time they spent in conversing with Dolen. The Respondent's further discipline of Hubert and Lawson for their failure to correct their timecards to forfeit payment for any time of their discussion with Dolen, therefore, also violated Section 8(a)(3) and (1).

III. THE 8(A)(5) AND (1) ALLEGATIONS

A. *The Allegation of Bad-Faith Bargaining*

The judge found that since November 18, 1980, the Respondent engaged in an overall pattern of conduct designed to frustrate the bargaining process, thereby violating Section 8(a)(5) and (1) of the Act. He further found that, although the Respondent engaged in extensive bargaining on most issues in dispute between the parties for which no independent evidence of bad-faith bargaining exists,[6] the Respondent's bad faith concerning the topics of checkoff, the zipper clause, the absence control program, and the recognition clause indicated that it was seeking to frustrate the bargaining process. His basis for finding bad-faith bargaining on these specific topics is discussed in greater detail below. As further evidence of bad-faith bargaining, the judge relied on what he found to be the false reason the Respondent provided for its refusal to provide a wage increase in February 1981. He concluded that the Respondent had bargained in bad faith since at least November 18, 1980. It was on this date that the Respondent rejected the Union's proposal for checkoff,[7] the earliest action by the Respondent on those topics concerning which the judge found bad-faith bargaining.[8]

The Respondent excepts to the judge's analysis of its conduct during negotiations. We find merit in the Respondent's exceptions. For the reasons explained below, we disagree with the judge's analysis of the Respondent's bargaining on the four topics concerning which he specifically found bad-faith bargaining. In considering these topics, we stress that our examination of the Respondent's bargaining positions and proposals relates to whether they indicate an intention by

[6] The Respondent thus dismissed allegations that the Respondent specifically engaged in bad-faith bargaining with regard to these negotiation topics: management rights, grievance procedure and arbitration, seniority, recognition of the Union's local, hours of work, holidays, union leave of absence, bulletin board, duration, the ''takeaway'' provisions proposed by the Respondent, supply-and-demand wage bargaining, delayed benefit coverage, voluntary layoffs, equal distribution of overtime, and reinstatement rights. We find no merit to the General Counsel's or the Charging Party's exceptions with respect to the first five of these topics. As for the subsequent topics, no exceptions were filed.

In adopting the judge's dismissal of the allegation of bad-faith bargaining on management rights, we note that the judge erroneously stated that the Union did not object to the Respondent's proposal on the basis that it was overbroad. However, we find this error nonprejudicial given the other grounds for dismissal. Further, in adopting the judge's dismissal of the allegation of bad-faith bargaining on hours or work, we disavow the judge's statement that the Respondent's stated reason for wanting to retain its control of the shift hours or to avert traffic jams in a large industrial park with limited access and egress was a sham. The record does not indicate that the Respondent's concern was merely hypothetical.

[7] The judge erroneously noted that the Respondent rejected the Union's proposal for checkoff with ''a close-minded hostility revealed by the counterproposed punishment of any employee who attempted to collect dues in other ways.'' What the Respondent counterproposed was that employees would be disciplined for collecting dues during ''working time.'' This would merely protect the Respondent's legitimate interest in preserving ''working time'' for business purposes and would not, as described by the judge, penalize employees for collecting dues in all other possible ways.

[8] The judge found that the Union engaged in bad-faith bargaining on the issues of recognition and work rules and by its repudiation of an agreement on the discharge of probationary employees. He found no merit to the Respondent's contentions that the Union also engaged in bad-faith bargaining on the subjects of union security, the ''floater holiday,'' and superseniority and by repudiations of other agreements. However, he concluded that the Union's misconduct did not exonerate the Respondent from its duty to bargain, nor lessen the need for a bargaining order. Because we dismiss the allegation that the Respondent violated Sec. 8(a)(5) and (1) by surface bargaining, we find it unnecessary for the most part to pass on the judge's discussion of what he deemed to be misconduct by the Union. Thus, for reasons, explained below, we have considered the Union's bargaining conduct only on certain topics and only as relevant to whether the Respondent bargained in good faith on the identical topics.

the Respondent to avoid reaching an agreement; it is *not* a subjective evaluation of their content.[9] We stress further that, in dismissing the allegations that the Respondent violated Section 8(a)(5) and (1) by its bargaining conduct, we are relying on the totality of the Respondent's bargaining conduct.[10] Thus, as discussed below, the Respondent's bargaining on these topics must be examined in the context of the Respondent's frequent (53) meetings with the Union, its extensive explanations for its positions and extensive examination of the Union's proposals, its agreement with the Union on at least 23 topics, its numerous significant concessions,[11] and the absence of evidence that it procedurally tried to frustrate the bargaining process. Further, although we have adopted some of the judge's findings that the Respondent engaged in acts of misconduct away from the bargaining table, these are not sufficient, as discussed below, either to warrant a finding of overall bad-faith bargaining or to taint the Respondent's bargaining positions on the four topics discussed below with an unlawful intent of frustrating agreement.

1. The ''Zipper'' clause

The judge found that on January 9, 1981, the Respondent proposed a scope of agreement or ''zipper'' clause and thereafter refused to modify the proposal despite repeated objections by the Union.[12] He further found that section 2 of the proposed clause contained ''unprecedented'' language that sought concessions from the Union beyond those usually included in clauses of this type. That is, he found that section 2 would force a party not only to abandon all rights to negotiate during the term of the contract, but also to waive other rights guaranteed by the Act and by other Federal or state statutes. In support of his findings, he interpreted testimony of the Respondent's chief negotiator, Mathias Diederich, as indicating that the Respondent would use the zipper clause to require the Union to waive any statutory right. On this basis, he found the insistence on the proposal a per se violation of Section 8(a)(5) and (1).

In its exceptions, the Respondent contends, inter alia, that the judge's finding that it insisted on its initial proposal was factually inaccurate in that the Respondent had added section 3, a savings clause,[13] on April 9, 1981, and it had expressed willingness to agree to a zipper clause not containing section 2. The Respondent further argues that the judge's finding that the proposed zipper clause was unreasonable was based on a misinterpretation of Diederich's testimony and that his testimony in fact indicated that the Respondent did not intend the zipper clause to require the Union to waive all rights under the Act and other statutes and that it so advised the Union during negotiations. Further, the Respondent argues that the Union never inquired during negotiations whether section 2 would cover statutory claims or objected to its inclusion on that basis.

We agree with the Respondent. At the outset, we note that the judge made a factual error by omitting the April 9 modification. We also note that undisputed testimony indicates that the Respondent did not insist on the inclusion of section 2, but, as noted by the judge, told the Union that it was willing to agree to the ''Mastic'' clause, a zipper clause that did not include a section 2. Thus, we cannot agree that the Respondent refused to modify its position on the zipper clause throughout negotiations.

Moreover, even assuming arguendo that the two-paragraph, proposed zipper clause that the judge found unlawful facially supports his reading of it, we cannot agree with the judge's finding that Diederich's explanation of the clause, quoted at footnote 94 of his decision, indicated that the Union would have to waive its rights under any and all statutes. Diederich testified that he had in mind

> the normal case [where] a matter comes up in collective bargaining . . . . [T]he Board says the clause [is] inadequate. Then, in that case, the other party who was claiming the benefit of this zipper clause would have the right to . . . say ''we would like a clear, concise waiver from you of this item.''

In our view, this testimony indicates that Diederich was simply seeking an effective, but not necessarily unconventional, zipper clause. Our interpretation is particularly plausible in light of the testimony that Diederich expressed willingness to agree to the ''Mastic'' clause, and further testimony, also referenced by the judge, that Diederich informed the Union that the Respondent's goal was a clause acknowledging that the agreement superseded all past practices and other agreements, and the fact that the Union's objections to the clause were to the necessity of the scope-of-agreement clause per se and not to the possible waiver of all statutory rights.

[9] See *Reichhold Chemicals*, 288 NLRB 69 (1988).

[10] See, e.g., *Tritac Corp.*, 286 NLRB 522, 523 (1987); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1601 (1984).

[11] See fn. 27, below.

[12] The full text of the proposal is set out in sec. III,D,1,b of the judge's decision under the subheading of ''Bargaining Session No. 18; January 22, 1981.''

[13] The saving clause states:

> Section 3. Should any provision of this agreement be declared invalid by any competent court or other governmental authority, the remaining provisions shall remain in full force and effect. Should there be any conflict between any provision of this agreement and any agreement settling or conciliating any charge or complaint filed with any governmental agency, the terms of the settlement or conciliation agreement shall prevail, provided that prior to executing any such agreement, the Company will meet with the Union to discuss the charge or complaint and agreement and attempt to obtain the Union's ratification of such agreement.

Thus, we find nothing indicating bad faith in the course of the Respondent's bargaining concerning this clause.

2. Checkoff

The judge found that the Respondent's conduct in bargaining over the Union's proposed checkoff provision indicated bad faith because the reasons the Respondent provided for not agreeing with the Union's proposal were a ''sham.'' He also concluded that Diederich's assertion at the December 11, 1980 negotiating session that the Respondent also wanted a rule prohibiting employees from collecting dues on working time demonstrated an inflexible position to which the Respondent adhered throughout negotiations. We disagree with each of the judge's conclusions.

It is settled that an employer is not required to accede to a union's demand for checkoff.[14] Here, the evidence simply does not reveal that the Respondent's bargaining on checkoff was designed to prevent an agreement being reached. That the Respondent never refused to discuss checkoff but was willing to discuss it every time the Union brought up the subject is clear on the record.[15] Further, the Respondent's comments on checkoff during bargaining were substantive, not perfunctory. Thus, Diederich asked how often the Union wanted (checkoff) dues collected and who would absorb the cost. He also pointed out to the Union during bargaining that checkoff had been provided at another of the Respondent's facilities in exchange for some concession by the Union, thereby indicating that the Respondent was not foreclosing such an exchange here. We also note that the Union's bargaining position on checkoff was no less adamant than the Respondent's.[16] The Union never varied its proposal and never indicated a willingness to give a concession in exchange for checkoff. Further, the Union advanced only one reason for its proposal—efficiency.[17]

Accordingly, under all the circumstances, we find that the General Counsel failed to establish that the Respondent engaged in bad faith bargaining on checkoff.

[14] See *Tritac Corp*., supra, 286 NLRB at 523; *American Thread Corp*., 274 NLRB 1112, 1112 (1985); *McLane Co*., 166 NLRB 1036 fn. 2 (1967), enfd. 405 F.2d 483 (5th Cir. 1968).

[15] According to testimony, credited by the judge, checkoff was discussed at these negotiation sessions: November 6 and December 11, 1980, April 15 and May 14, 1981, and February 19, 1982.

[16] See *Raybestos-Manhattan, Inc*., 168 NLRB 396, 410 (1967), where an employer's alleged bad-faith bargaining on checkoff was considered in the context of the union's ''fixed and adamant attitude.''

[17] Contrast *Stevenson Brick & Block Co*., 160 NLRB 198 (1966) (the union's offer to provide clerical assistance to collect the union dues and the employer's refusal to countenance such proposal contributed to finding of bad faith). See also *McGraw-Edison Co*., 172 NLRB 1604, 1609 (1968) (union made identical proposals).

3. The absence control program

The Respondent proposed a provision to discourage absenteeism based on a point system. Employees would receive one point for an absence and one-half point for tardiness. Points would be subtracted from an employee's attendance record for each 4-week period of perfect attendance.[18]

The judge found under the Respondent's proposal no grievance would ever be winnable because the proposal did not provide for recordkeeping and it permitted the Respondent to exercise untrammeled discretion to impose the ultimate discipline or no discipline on employees who accumulated six points in 26 weeks. He found that the review of discharges for absenteeism by higher management provided by the April 16 modification was meaningless because it would involve choosing between a supervisor's or employee's memory of absences. Although Diederich testified that the Union could win a grievance by showing discrimination,[19] the judge found the wide range of discretion permitted by the program guaranteed the Respondent's right to be arbitrary. The judge, accordingly, found the program to be so ''unusually harsh, vindictive, or unreasonable'' as to evince bad faith. The Respondent excepts, challenging the judge's conclusions that there would be no recordkeeping and that no grievance would be winnable. We find merit in the Respondent's exceptions.

First, we cannot conclude from the face of the final version of the proposal that there would be no recordkeeping. According to Diederich's unrefuted testimony, the points themselves were a form of recordkeeping. Diederich further testified, without contradiction, that the implementation of the proposal would include recordkeeping of the reasons for the points as well. He noted that this was not discussed during negotiations.

[18] This proposal was first made January 8, 1981, and subsequent to revisions dated April 7 and 16, 1981, read as follows:

> Section 5. The parties recognize the importance of regular attendance and minimizing absenteeism, tardiness and leaving work early. Therefore, the following absentee control policy is recognized as reasonable and in effect. An employee who is absent shall receive one point on the employee's attendance record. In the case of a prolonged absence, only one point shall be recorded. An employee who is tardy by 6 or more minutes or leaves work early, shall receive one-half point on the employee's attendance record. No points shall be recorded for absences due to vacation, jury duty, funeral leave or leave of absence approved by the Company. Upon the accumulation of 3 points within any 12 week period, the employee shall receive a written warning notice that further unacceptable attendance may lead to discharge. After the receipt of such written warning notice, one point will be subtracted from the employee's attendance record for each 4 week period without the addition of any points or half points. In the event the employee, after receipt of a written warning, and before completely clearing the record of all points accumulated, accumulates 6 points in any 26 week period, the Company shall have the right to discipline such employee by written warning, suspension without pay for three days, or to discharge such employee. Any employee to be discharged under this Section 5 may, upon request, have the discharge reviewed for fairness by a committee composed of a Staff Level Manager, Manager of Human Resources and a Department Level Manager of the employee's choice.

[19] The Respondent's contract proposals had an antidiscrimination clause.

Nor is there evidence that the Union objected to the proposal on the basis that it failed expressly to provide for recordkeeping. We, therefore, find no basis for adopting the judge's finding that the Respondent was proposing a system in which all grievances would be unwinnable in part because there were no recordkeeping safeguards.

Similarly, we cannot conclude that a review by higher management would be meaningless. Part of the judge's reasoning on this issue was based on his finding that there would be no recordkeeping and, hence, that any review would involve pitting a supervisor's memory against that of an employee. For the reasons stated above, we reject this basis for finding that the proposal evinces bad-faith bargaining. We further reject the judge's conclusion that the proposal, by giving the Respondent discretion regarding the level of discipline to be imposed, guaranteed the right of the Respondent to be completely arbitrary in its treatment of employees who accumulated points under the system. As the Respondent emphasizes, the proposed system contains the right of appeal to higher management for review ''for fairness.'' Any arbitrariness that might occur because of the Respondent's discretion regarding the degree of discipline would be checked by the just-cause clause discipline provision and the no-discrimination provision in the proposed agreement. Thus, the contract provides a ground for an employee to argue that the Respondent's imposition of discipline under the absence control provision was either discriminatory or lacked just cause. In these circumstances, we cannot agree that the structure of the system proposed by the Respondent rendered an employee's right to review by higher management meaningless.

Finally, we find that the evidence establishes that the Union was at least equally responsible for the failure to reach agreement on this topic. Thus, although the Respondent modified its proposal on April 7 and further modified it on April 16 by including the provision for review by higher management, the Union adamantly refused to bargain over any work rules for the first 34 bargaining sessions. As part of this refusal, it never made a full counterproposal with respect to the absence-control program. Its sole proposals concerning this topic were that employees would not get points for going to doctor's appointments or taking their children to such appointments, and that no points would be given for illness. In the face of this conduct by the Union, we do not find that the Respondent's proposals established bad faith.[20] Thus, where both parties have been equally adamant on the same topic and fail to reach agreement, the Board has found a genuine deadlock rather than bad-faith bargaining by one party.[21]

4. Recognition

The judge found further evidence of the Respondent's bad faith in its negotiation over a portion of the recognition clause. That portion, as phrased in the Respondent's last proposal, provided:

> If the Company decides to create new jobs not presently described in the above-described bargaining unit during the term of the agreement, the Company agrees to notify the Union of its intent and to bargain in good faith with respect to the inclusion or exclusion of such new jobs in the bargaining unit. If no agreement can be reached by the parties, they agree to be bound by a determination of the National Labor Relations Board, or Court of Appeals, as to the inclusion or exclusion of such new jobs.

Assessing the right of review by the court of appeals of unit placement determinations as a nonmandatory subject of bargaining, the judge concluded that the Union was entitled to stand on its objections to the inclusion of a clause containing such a subject and that the Respondent's insistence on the clause constituted a per se violation of Section 8(a)(5). We disagree.

At the outset, we note that the Union did far more than merely object to the inclusion of a clause containing a nonmandatory subject of bargaining. According to the undisputed testimony, the Union was itself insisting on the inclusion of a nonmandatory subject. The Union's January 28, 1981 recognition proposal required that the parties be bound by determinations of the National Labor Relations Board. Thus, the Respondent first offered its court of appeals language to counter the Board language in the Union's proposal. Further, although the Union later agreed to delete the language referring to the Board, it then insisted that unit determinations be finalized by arbitration. In the presence of equally insistent behavior on the same issue, we decline to rule that the Respondent unlawfully insisted on a nonmandatory subject of bargaining.[22] Thus, it is impossible to calculate how flexible the Respondent's position might have been if not met by the equally obdurate position of the Union.[23]

5. Conclusions on overall bargaining

As noted earlier, the judge found that although the Respondent's extensive bargaining on many topics gave no indication of bad faith, he nevertheless found that the Respondent had engaged in overall bad faith

[20] In this context, we find it unnecessary to reach the issue of whether the proposal could otherwise be deemed ''so predictably unacceptable as to warrant the evidentiary conclusion that [it has] been reoffered in bad faith.'' *Pease Co. v. NLRB*, 666 F.2d 1044 (6th Cir. 1981).

[21] See *Bloomsburg Craftsmen*, 276 NLRB 400 (1985); *Unoco Apparel*, 208 NLRB 601, 607–608 (1974), enfd. 508 F.2d 1368 (5th Cir. 1975).

[22] See *Bloomsburg Craftsmen*, supra; *Unoco Apparel*, supra.

[23] *Bloomsburg Craftsmen*, supra.

bargaining because of its positions on the topics discussed above. Contrary to the judge, however, we have found nothing unlawful in the Respondent's conduct concerning these topics. Accordingly, we conclude that the record does not support a finding that the Respondent engaged in an overall pattern of conduct designed to frustrate the bargaining process. Instead, our examination of the entire course of the Respondent's bargaining reveals that the Respondent was seriously attempting to reach an agreement. It met with the Union on 53 occasions between October 7, 1980, and February 19, 1982. It provided frequent and extensive explanations for its positions and, as the union representative conceded, it intensively examined the Union's initial proposal during the first seven bargaining sessions. Nor was the Respondent merely engaged in the discussion and examination of proposals; it reached full agreement with the Union on at least 23 topics,[24] and made numerous significant concessions.[25]

In sum, it appears that the Respondent was not attempting to avoid reaching an agreement but rather to secure an agreement favorable to itself. It is well settled that working toward such an end evinces not surface but hard bargaining.[26] In furtherance of this aim, the Respondent repeated throughout negotiations not only that it was in a position of economic strength but that this position was crucial to maintain in the highly competitive world market. It is not unlawful for an employer to flex its economic muscle in negotiations, just as it is not unlawful for a union to refer to and make use of its power to strike.[27] This is especially the case where, as here, the Respondent has demonstrated flexibility by making concessions, reaching agreements, and providing extensive explanations of its bargaining positions and by not engaging in attempts to frustrate the bargaining process procedurally.

Finally, although the Respondent engaged in some acts of misconduct away from the bargaining table, we conclude that this does not warrant a finding of overall bad-faith bargaining. In this connection, we are reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table. Typically, away from the table misconduct has been considered for what light it sheds on conduct at the bargaining table, but without evidence that the party's conduct at the bargaining table itself indicates an intent to reach agreement it has not been held to provide an independent basis to find bad-faith bargaining.[28] In any event, the Respondent's conduct away from the table here does not indicate an intention to avoid an agreement.[29] Thus, although the Respondent violated Section 8(a)(5) and (1) by making unilateral changes in its rule on employee meetings in the cafeteria and on the patio, and its practice of providing an extra half hour for lunch the day before Christmas, there is no evidence that these issues were linked to the ongoing negotiations in such a way as to frustrate the reaching of an agreement.

Further, although we find that the Respondent also violated Section 8(a)(5) and (1) by failing to grant a regularly provided wage increase in February 1981, we cannot conclude that this action prevented the parties from reaching an agreement. The judge found that the Respondent's reason for its failure to provide this increase indicated it was attempting to discount the cost of the Respondent's wage proposal by the usual amounts of the increase. We do not agree with this analysis. The parties' positions on wages throughout negotiations, as discussed below, were too far apart to permit an inference that the small amount involved in the February 1981 increase (from 11 cents to 18 cents per hour, depending on employee classification) was significant with regard to the outcome of the bargaining.[30]

[24] Agreement (including partial agreement) was reached on the following issues on the respective dates: safety equipment (November 5, 1980); grievance form (November 6); shift preference (December 2); callback (December 2, 1980, and January 8, 1981); group leaders' pay premium (December 9); military leave (December 10); job bidding and posting (the judge did not specify the date of the agreement, only that it was the ''most complex'' issue discussed by the parties); timeclock (December 11); call-in pay, report-in pay, funeral leave, jury leave (all four on January 21, 1981); seniority during medical leave (January 28); new shift staffing and stock purchase and retirement plans (January 28); supervisors working and leaves of absence (February 10); presence of union representatives in plant to discuss grievances; telephone use and discipline concerning such use (February 11); no smoking in cafeteria (February 17); no-discrimination clause (February 18); written notice of new job while on layoff required for loss of seniority (April 1); and temporary upgrades and downgrades (April 2).

[25] The Respondent made concessions on the following topics on the dates specified: seniority list (November 8, 1980); call-in time for absentee employee (January 8, 1981); bulletin boards (January 28); designation of floater holiday and holiday pay for probationary employees (January 29 and March 5); leave of absence to attend union International and district council meetings, and permitting union representative to investigate grievance on companytime (February 10); preamble and productivity clause dropped from management-rights clause (February 11); timing of the grievance steps (February 12); that the Respondent would ''acknowledge and agree'' to recognize the Union as the agent of the International (February 18); holiday pay and time during which strike permitted after grievance denied (February 25); right to discipline, discharge, and set standards of production removed from management-rights clause (March 6); health insurance (March 6 and April 9, 10, and 13); automatic rather than merit wage increases except for labor grades 27 and 28 (March 12); seniority (April 1, 9, and 16); union steward at grievance meetings (April 1); pay while on sick leave for more than 4 days (April 2); efficiency-quality-productivity clause removed (April 9); lockout limited to period after the Respondent's grievance denied (April 9); discipline and discharge (April 16); absence control (April 16); grievance procedure and no-strike (April 16); management-rights clause (April 16); rules of conduct and disciplinary procedure (April 16); inclusion of senior receiving inspector (May 13); and contract duration (January 21, 1981).

[26] *American Rubber & Plastics Corp*., 200 NLRB 867, 875 (1972).

[27] See *Roman Iron Works*, 275 NLRB 449, 452, 454 (1985).

[28] See *Baldwin County Electric Membership Corp*., 145 NLRB 1316, 1317–1318 (1964).

[29] See *Roman Iron Works*, supra, 275 NLRB at 543; *Wallace Metal Products*, 244 NLRB 41, 50 (1979). Although the Respondent also engaged in various acts of misconduct in violation of Sec. 8(a)(3) and (1), no party contends that there is a connection, and we find no connection, between this conduct and the Respondent's bargaining conduct.

[30] Similarly, we reject the judge's conclusion that the Respondent provided conflicting and incorrect wage information in order to distort the wage picture so as to make the Union's wage proposals appear inflated. As discussed below, we find that the wage information was not incorrect or conflicting; therefore, it did not interfere with bargaining on wages.

Specifically, the Respondent proposed, on March 12, 1981, a wage proposal that would leave wages at their current level until August 1, 1981, at which time, assemblers' wages would increase from $3.75 to $4.04 ($4.16 if in grade for 90 days).[31] On the other hand, the Union consistently proposed throughout the course of negotiations that the wages the Respondent provided for its plants in Minneapolis be provided here. It, therefore, initially requested that all employees be given an immediate increase of 85 cents per hour. This initial increase was to be followed by increases at 3- 6-, and 9-month intervals to bring the employees up to the Minneapolis level by the end of the proposed contract term, October 1982. At this final level, most classifications would be paid at least $2 per hour more than the rate at the time of the Union's proposal.[32] The Union persisted in its overall wage proposal.[33] In fact, at the last negotiating session on February 19, 1982, it proposed an immediate $1.50-per-hour wage increase. At no point did the Union propose anything lower than an immediate wage increase commencing at 85 cents per hour. With both parties steadfastly asserting wage proposals that were so far apart, we cannot conclude that the Respondent's failure to provide the February wage increase evinced an intention to avoid an agreement on wages.

For all these reasons, we conclude that the Respondent's overall course of bargaining did not indicate bad faith or amount to unlawful surface bargaining. We therefore dismiss this allegation of the complaint.

B. *Alleged Unilateral Actions*[34]

1. Breaks

According to Manager of Manufacturing Operations John McCartin, after he was hired on September 8, 1980, he noticed that the clocks throughout the plants were not synchronized. He further noticed that this situation resulted in employees going and returning from their breaks at different times, which interfered with the coordination of the production lines. Accordingly, a central clock and buzzer system were installed on December 5 and the employees were informed that they were not to begin their traditional two 10-minute paid breaks or 30-minute unpaid lunchbreak until a buzzer went off. Another buzzer would indicate the end of the break.

The complaint alleged and the judge found this change in the break constituted a unilateral change which, because made without bargaining, violated Section 8(a)(5) and (1). The judge based his finding on the fact that some employees had been permitted to consider only their time in the lunchroom as their breaktime, not including the traveling time involved from various parts of the plant that could be as much as 2-1/2 minutes. He discredited the testimony of supervisors that the Respondent's practice of disciplining employees for late return from breaks did not vary after the buzzer system was installed. The judge therefore reasoned that the newly instituted buzzer system in effect shortened the employees' breaktime and was, accordingly, unlawful.

We disagree. For a unilateral change to be unlawful, it must be ''material, substantial, and significant.''[35] We do not find the installation of the buzzer system satisfies these criteria.[36]

According to the uncontradicted testimony of employees Carrie Dickens and Sandra Heider, a consequence of the new system was that some employees spent a portion of their break walking to and from the lunchroom or chose to remain at their work station during their break. The official time allotted for the

[31] The Respondent does not appear to have altered this proposal until January 21, 1982, when it proposed an increase of 15 cents beginning August 1, 1982.

[32] For instance, assemblers, the most populous classification, who currently received $3.75 per hour, would be paid at a $6-per-hour rate according to the Union's proposal by the end of the contract term.

[33] Its March 10, 1981 proposal sought the following: an immediate 85-cent-per-hour increase with periodic increases bringing the assemblers to $6.59 by May 1, 1982. Its July 21, 1981 proposal reduced the top rate for each classification by 10 cents per hour and called for February 1 and April 1 increases to be made retroactively.

[34] We adopt the judge's findings that the Respondent made unilateral changes in violation of Sec. 8(a)(5) and (1) by refusing to provide a regularly provided semiannual increase in February 1981 and by announcing new rules about meetings in the cafeteria and on the patio. In adopting these findings, however, we find it unnecessary to rely on the judge's finding that the Respondent could not claim impasse because of its bad-faith bargaining since November 10, 1980. Thus, the judge found that, even if the Respondent had not otherwise bargained in bad faith, the evidence showed that the withholding of the February increase was unlawful. As for the changes in the rules for employee meetings, the judge found that there had been only one discussion between the parties about meetings in the cafeteria (at the January 21 bargaining session) and none about meetings in the patio before implementation of the new rules. Further, we note that at fn. 133 of his decision, the judge erroneously stated that the Respondent has only one other location. According to unrebutted testimony, it has four. This error is nonprejudicial to the judge's finding on the failure to provide the February wage increase.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally discontinuing the extra paid half hour for lunch on the day before the Christmas holiday, we rely solely on the following reasons. The Union learned of the Respondent's intentions indirectly, only 2 days before December 23, 1981, when the holiday lunch was expected to occur. When the Union's representatives voiced a desire that the tradition continue, the Respondent claimed there had been no final decision, but then announced on December 22 that there would be no paid extra half hour for the lunch unless the Union could establish an ''economic justification'' for the practice. Under all the circumstances, it seems clear that the Union was faced with a fixed decision over which the Respondent had no intention of seriously bargaining. Contrary to our dissenting colleague, we regard the practice of providing a paid half hour preholiday lunch as sufficiently longstanding to constitute a condition of employment. In the years 1977, 1978, 1979, and 1980 the Respondent had provided an extra paid half hour for a lunch preceding either the Thanksgiving holiday or the Christmas holiday. In 1981 no such benefit had been provided before Thanksgiving, so the decision not to give it at Christmas represented a change in a 4-year practice.

Member Oviatt would find that the Respondent did not violate Sec. 8(a)(5) and (1) when it decided not to give an extra paid half hour for lunch the day before Christmas. In his view, the Respondent had no consistent practice of granting the employees an extra paid half hour for lunch before Christmas. Because there was no past practice, Member Oviatt would find that the Respondent was not obligated to bargain about its decision not to grant one extra half hour for lunch in 1981.

[35] See *Peerless Food Products*, 236 NLRB 161 (1978).

[36] See *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976).

breaks has not changed. That at some location of the plant employees may have enjoyed a grace period of a couple of minutes in transit to and from their breaks before the buzzer system was installed can hardly be viewed as making the buzzer an employment term or condition of much significance.[37] This is especially the case where, as the judge noted, the evidence fails to demonstrate any discernible pattern of those grace periods. Because any change pursuant to the buzzer system did not have a meaningful impact on the employees' terms and conditions of employment,[38] we dismiss the allegation.[39]

2. Dental insurance premiums

We do not adopt the judge's finding of a violation in the implementation of an increase in the amount employees were asked to pay for dental insurance premiums for employee-only coverage (from no payment to $1.61 a month). We have reversed the judge's finding that the Respondent engaged in surface bargaining, so if the parties reached impasse on this issue before the increase was implemented, there is no violation. We find they reached impasse. The Respondent proposed the change on November 19, 1980, explaining to the Union that the insurer would be raising the premium rates in January 1981. The Union counterproposed that the Respondent absorb the increase and continue to pay the entire premium for both employee-only and employee-and-dependent (or ''family'') coverage. Each party adhered to its position when the issue was raised again, at the December 9 bargaining session. Under all the circumstances, including the limited time frame for resolution of the issue imposed by the action of the third party (the insurer), we conclude that the parties had ''exhausted the prospects of concluding an agreement.'' *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).[40]

3. August 3, 1981 changes

On August 3, 1981, the Respondent instituted various changes in the areas of wage rates, night-shift premiums, accident and sickness insurance coverage as pertaining to paid time off, and rates paid for medical insurance coverage. The Respondent contends, and no party disputes, that these changes were consistent with the Respondent's last proposal on each item. However, the judge found that because the Respondent had engaged in bad-faith bargaining since November 18, 1980, it was precluded from claiming that the negotiations were at a genuine impasse that permitted it lawfully to implement its last offer. The judge therefore concluded that the Respondent violated Section 8(a)(5) and (1) by making these unilateral changes.

We disagree. For the reasons fully explained above, we find that the Respondent did not engage in bad-faith bargaining beginning November 18, 1980. We further find that those incidents where we have found unlawful unilateral changes do not alter this finding.

The Board has long held that the relevant factors to be considered in determining whether a genuine impasse existed are the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues on which disagreement exists, and the contemporaneous understanding of the parties as to the state of negotiations.[41] Our review of the record reveals that all these factors militate in favor of a finding that the parties had reached a genuine impasse.

As for bargaining history, the Respondent had been in operation for less than 4 years when the Union was certified in October 1980 and had no previous bargaining history with this or any other union at this location. However, the Respondent did not deny its obligation to bargain on certification, and negotiations commenced shortly thereafter. At no time has the Respondent denied that it was subject to such an obligation.

As for the good faith of the parties, for reasons fully discussed above we have found that the Respondent's overall course of bargaining was in good faith. Further, although we have found isolated incidents of unlawful conduct, as we have also explained above, these were not responsible for the parties' failing to reach an agreement and do not warrant a finding of surface bargaining. Finally, although the Respondent contends, by

[37] Ibid.

[38] Our conclusion is not affected by the judge's discrediting of the three supervisors' testimony that discipline for lateness did not vary after the system was altered. The judge acknowledged that no discipline greater than a verbal warning had occurred after the installation of the buzzer system. Neither can we agree with him that a proposal by the Respondent on ''rules of conduct'' indicates that the Respondent's disciplinary policy or practice with regard to lateness has changed. The record fails to show such a change.

[39] Chairman Stephens disagrees with his colleagues and agrees with the judge that the Respondent's unilateral change in breaktimes and installation of the buzzer system violated Sec. 8(a)(5) of the Act.

As the majority points out, the Respondent's manager of manufacturing operations, John McCartin, recognized a problem in connection with breaks that he deemed a serious enough impediment to efficiency and productivity that he incurred the expense of a new central clock and buzzer system. As a result, it is undisputed that some employees had their break periods reduced by more than 20 percent. Indeed the testimony by employees Dickens and Heider relied on by the majority, acknowledges that ''the effect of this system is that some employees spent a portion of their breaks walking to and from the lunchroom or chose to remain at their work station during their break.''

Although the change may not have been ''material, substantial, and significant'' across the board for all employees, it cannot be gainsaid that it was for those employees whose breaktime was reduced by 20 percent or more. They now have to remain at or near their work station during their break because the change eliminated the previously existing grace period. In sum, although the change may have been an entirely sensible one from the Respondent's viewpoint, it is nonetheless a change about which the Union should have been given notice and an opportunity to bargain.

[40] Member Devaney would find that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing an increase in the dental plan premium for employee-only coverage to be paid by unit employees. In his view, the preliminary discussions about this issue that occurred before the Respondent's January 5, 1981 announcement of the increase were not sufficient to permit the conclusion that the parties were at impasse.

[41] *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

way of affirmative defense, that the Union engaged in bad-faith bargaining, no such unfair labor practice charges are before us.[42] We therefore conclude that the prerequisite of good-faith bargaining was sufficiently met to find a genuine impasse.

Further, there appears to be little disagreement that on the date of the alleged impasse, after 47 negotiation sessions, the parties were far away from reaching an agreement on many points, including issues of significance to both parties. Thus, the parties had failed to reach agreement on 50 issues. These included the four issues without which the Union, by its own admission, at the March 12, 1981 session stated it would not sign the contract: layoffs on a strict seniority basis, no loss of seniority if an employee took another full-time job while on layoff, a 10-day period to strike after denial of grievances at the third step, and handling of grievances on working time. The parties had agreed at the first session that there would not be an agreement until the parties agreed on all provisions. It is also noteworthy that the parties were still significantly apart on wages. The Union adamantly insisted on the much higher wages the Respondent provided at its Minnesota plant, and the Respondent was simply unwilling for economic reasons to provide them.

Finally, we find that the contemporaneous understanding of the parties as to the state of negotiations indicates that the possibility of reaching agreement was virtually nil. Thus, on April 2, 1981, at bargaining session 33, the Respondent announced that it was preparing its final proposal. On April 9, it presented its final proposal already signed by Personnel Director Kenneth Virag. It did, however, consent to further revisions during session 37 on April 16. After this session the Union made no more concessions. Also, after this session, in at least four out of five of the next sessions, the Respondent repeated that it had spent all the money it was going to spend, that there was no further room for movement, and that the revised April 9 offer was its best offer. The Union responded with accusations of bad-faith bargaining, commencing June 25. At the following meeting on July 22 the Respondent announced it would implement at least the wage proposal of its final offer. The Union responded with more accusations of bad faith at session 47, July 30. This was the last session for Chief Union Negotiator Miller. After this session, he left the negotiations[43] to Kathy Laskowitz and Carol Lambiase. According to Miller, the Union still wanted to try to negotiate the differences and he told Laskowitz to see if there was any room for improvement. As noted above, however, the Union made no further concessions; the Respondent made only a very few. On January 21, 1982, the Respondent proposed a wage increase of 15 cents on August 1, 1982, and the extension of contract termination to February 6, 1983.[44] Instead, much of the remaining negotiating time was consumed by the Union's accusations of bad-faith bargaining. The negotiations broke off completely February 19, 1982, after session 53. These facts clearly indicate that the parties had been operating for some time under the impression that further bargaining was futile. We find it reasonable to date the parties' perception that negotiations had reached an impasse at July 30, 1981, the date on which the Union's chief negotiator abandoned the negotiations and after which six unproductive, accusatory sessions occurred over the next 7 months during which no agreements were reached and counterproposals were rare.[45]

On the basis of these factors, then, we conclude that the parties had reached impasse by July 30, 1981. In our view, the conduct of the last few bargaining sessions amply illustrates that the bargaining was stalemated on numerous topics. ''The Act does not require futile negotiations, and the sessions actually fulfilled gave ample reason to believe that no useful progress could be made toward a total agreement . . . .'' *Whittier Area Parents' Assn*., 296 NLRB 817 (1989).

We further conclude that the Respondent's violations of Section 8(a)(5) and (1) during the negotiations period, as found above, do not preclude a finding that the parties reached a genuine impasse in negotiations for the following reasons. One, a crucial factor in determining whether a party has forfeited its privilege of announcing impasse and lawfully engaging in unilateral action is whether the party had by its own action precluded an agreement being reached.[46] We find that, on a practical level, the Respondent's unlawful conduct away from the bargaining table did not contribute to the deadlock in negotiations so as to prevent a lawful impasse. As we have explained in our discussion of surface bargaining, two of the Respondent's unilateral actions—discontinuing the extra paid half hour for lunch the day before Christmas, and changing the rule about meetings in the cafeteria and on the patio—involved minor topics only and far from crucial to the failure of the parties to reach an agreement. Further, as discussed above, the third unilateral change—the Respondent's failure to grant the semiannual February wage increase—did not have a significant impact on whether an agreement was achieved.

[42] Having dismissed the allegation of surface bargaining against the Respondent without consideration of this defense, it is therefore unnecessary to pass on the judge's findings of bad-faith bargaining by the Union.

[43] Miller returned to the final negotiating session (53) on February 19, 1982.

[44] The Respondent had consistently proposed the contract expire March 30, 1982, over much objection by the Union.

[45] For instance, at the last session on February 19, 1982, the Union proposed an immediate $1.50-per-hour wage increase. This was in response to the Respondent's proposal for a 15-cent-per-hour increase commencing in August 1982

[46] See, e.g., *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), enfd. mem. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982).

Thus, as reasons explained above, the parties' differences on wages were so pronounced that the Respondent's failure to provide an increase of approximately 3 percent[47] cannot reasonably be viewed as a significant stumbling block that prevented the parties from reaching agreement on wages, much less on the other approximately 50 issues on which the parties had not agreed.

In these circumstances, we find that the Respondent's conduct, either in the course of negotiations or away from the table, did not preclude the parties from reaching an agreement, and that a valid impasse had been reached.[48] Thus, the Respondent's postimpasse unilateral changes, consistent with its last proposal, were lawful.

C. *Alleged Refusal to Provide Information*

The complaint alleged and the judge found that the Respondent violated Section 8(a)(5) and (1) by providing the Union with conflicting and inaccurate wage information. We disagree with both findings.

As for the wage information, the evidence is as follows. On September 23, 1980, the Union by letter requested, inter alia, the following information:

> (1) A list of all bargaining unit employees by classification, showing their seniority dates and current rates of pay.
>
> (2) A list of all jobs in the bargaining unit, the top rate for each job, the progression schedule for reaching the top rate, and job descriptions.

On September 29, 1980, by letter, the Respondent advised that the information requested by item (1) would be sent as soon as possible. With respect to the second requested item, the letter stated:

> Attached is a list of all the jobs in the bargaining unit showing the top rate of pay. We do not have a progression schedule and current job descriptions are not available.

Attached to this letter was a two-column schedule. The first column was headed ''UNIT JOB CLASSIFICATION,'' below which were listed the various classifications; the second column was headed ''TOP RATE OF PAY (9–30–80),'' below which was listed a single rate for each job classification. For assemblers, who composed more than 90 percent of the unit, the ''top rate'' was listed as $4.70.

This information was supplemented by the Respondent 4 days later by a letter dated October 4, 1980. It responded to the Union's September 23, 1980 request by providing ''a list of all bargaining unit employees by classification, showing seniority dates and current rate of pay.'' The letter also stated that ''[u]nless otherwise indicated, all employees are in the assembler job classification.'' Attached was a computer printout dated October 1, 1980, and entitled ''LIST OF EMPLOYEES.'' Each employee was listed individually by name, department, employment number, class, rate, and date of hire.[49]

The Respondent's October 21, 1980 letter was followed by a January 15, 1981 letter from the Union, protesting that the computer printout of employees did not list the employees in any discernible order. The Union's letter requested that a current list be provided grouping the employees by job classification, listing the employees within descending order of plantwide seniority within each classification and showing each employee's current rate of pay. It further requested pertinent information on wage rates, the current ''top rate of each job'' (as referred to at p. 8 of the employee handbook), and a history of all wage increases for bargaining unit employees made at the plant since its opening.

The Respondent in its January 21, 1981 reply declined to resupply the information it asserted it had already provided the Union, claiming, ''you already have what you requested, except you will need to place the names in whatever order you wish.'' However, it provided current ''maximum rates'' as requested in a chart specifying the labor grades by number and their accompanying ''MAXIMUM/ANNUAL'' rate. The maximum annual rate for labor grade 21, that of the assemblers, was listed as $9350.

This information was supplemented February 10, 1981,[50] by a history of wage increases from July 31, 1977, through August 4, 1980, for the classifications of assemblers, custodians, adjusters, and material handlers, and by charts showing the salary ranges for nonexempt levels 1 through 9 and exempt levels 1 through 3, for the following time periods: August 1976 through July 1977, August 1977 through July 1978, August 1978 through July 1979, and August 1979 through July 1980.

The judge based his finding that the Respondent supplied inaccurate wage information on a dialogue

[47] As noted above, the February increase would have amounted to approximately 11 to 18 cents per hour. Throughout negotiations, the Union consistently requested an immediate (and later retroactive) increase commencing at 85 cents per hour for the lowest paid classification. It at no time reduced this figure to less than 85 cents per hour.

[48] See *J. D. Lunsford Plumbing*, supra (valid impasse found where no causal connection between the employer's failure to vacate its prior unilateral changes and the deadlock in negotiations). See also *Allbritton Communications*, 271 NLRB 201, 204–206 (1984), enfd. 766 F.2d 812 (3d Cir. 1985) (valid impasse found despite presence of earlier violation of Sec. 8(a)(5)). Cf. *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981); *Boulevard Storage Co.*, 152 NLRB 539, 542 (1965), enf. denied on other grounds sub nom. *United Fire Proof Workhouse Co. v. NLRB*, 356 F.2d 494 (7th Cir. 1960) (employer's surface bargaining and refusal to provide wage information, respectively, resulted in or ''contributed significantly to'' deadlock and, therefore, no legally cognizable impasse existed).

[49] On November 15, 1980, the Union received from the Respondent a chart labeling each classification by number.

[50] In the meantime, by a January 24, 1981 letter, the Union had repeated its request, inter alia, for a history of all wage increases.

that occurred at the seventh bargaining session, held January 21, 1981. Union Negotiator Miller complained that the wage information supplied that date conflicted with wage information provided at the start of negotiations. As an example, he compared the ''top rate'' of $4.70 for assemblers provided on September 30, 1980, with the $4.49[51] ''maximum rate'' for assemblers provided by the January 21 date. Miller testified that the Respondent's negotiator Diederich explained that there was a difference between the ''maximum'' of a labor grade and a ''top'' wage rate for employees in the labor grade and that the Respondent had thought the latter was what the Union wanted in its initial wage information request. The judge credited Diederich that he further explained to Miller that if there was a difference between the two figures with regard to any classification, it was because an employee had been ''red circled'' in his job. The judge recited the ''*Roberts Dictionary of Industrial Relations*'' definition of ''red circle rate'' as a rate higher than that called for by a job evaluation.[52]

The discussion about possible discrepancies in wage information data was repeated at the next bargaining session the following day, with Diederich as well as Virag repeating the Respondent's earlier comments about red circling. At that time, Virag further explained that the current maximums were put in effect in August 1980 as a result of an ongoing study entitled ''The Stanton Study.'' A similar exchange occurred at negotiating session 22 on February 11, 1981, in which further wage information, discussed above, including the history of the wage increase, was discussed. Virag again explained that the information reflected a decrease in maximum wage rates between July and August 1980, which had resulted from the study, and repeated that the red circling was also an effect of this study. Miller testified he had a copy of the study.

The judge found that the Respondent's ''red circling'' explanation was an ''ad hoc'' creation because it was not mentioned in the Respondent's September 29, 1980 response[53] to the Union's request or before bargaining session seven on January 21, 1981; there was no evidence the Respondent had ever told any employee he had been red circled; the Respondent presented no documentation that it had given raises beyond those allowed by its classifications; and it was the Respondent's responsibility to explain the difference between top rates and maximum rates when it provided the Union with the former in its September 29, 1980, reply.[54] He further found that the purpose of this ad hoc creation was to delude the Union by taking the parties' wage demands out of an accurate perspective. Thus, the Union's wage demands would appear proportionately excessive and the Respondent's proportionately more generous in comparison with what he found to be the artificially deflated base of the Respondent's ''maximum rates'' if the Respondent's red-circling explanation were accepted.

We disagree. First, we disagree with the judge that it was the Respondent's burden to produce specific documentation that it had red circled some employees in the past or to explain in its initial response the difference between the maximum wage for a classification and the top rate an employee in a classification received. An employer's duty when presented with a request for pertinent wage information is to provide that *requested* information. Here, the Union's September 23, 1980 letter requested the Respondent to provide the top rate for each job. In keeping with the Respondent's uncontroverted understanding of ''top rate,'' it supplied this information to the Union on September 29. As for the red circles, the Respondent provided oral explanations of this practice in at least three negotiating sessions. It also provided further wage information as requested when this issue came up in negotiations. At no time did the Union specifically request documentation of the red-circling practice. We accordingly cannot find any fault by the Respondent in not producing this information.

Further, even assuming arguendo that the Respondent was obliged to resolve any apparent conflict in the information it supplied, we find it did so adequately. Thus, not only did it explain to the Union its different interpretations of ''top rate'' and ''maximum rate'' and that it had a red-circling practice, but it offered an uncontroverted basis for the lowered maximum rate from July to August 1980, i.e., the Stanton study, which the Union admitted it had in its possession.

In addition, the Respondent supplied supplemental information that the judge does not mention in his discussion of this issue. On October 4, 1980, the Respondent provided the Union with the name, classification, department, seniority date, and wage range of every unit employee. Any confusion about what the Respondent had paid employees in the past could be resolved by looking at this information in connection with the maximum rates set forth in the Respondent's

[51] The judge erroneously described this as $4.41 in his summary of the bargaining session.

[52] According to Diederich's uncontradicted testimony, he told the union negotiators that red circles are ''when you have a maximum rate and somebody is paid over.''

[53] In his discussion of this issue, the judge mentions only the Respondent's September 29, 1980, and January 21, 1981 responses to wage information requests, not the October 4, 1980, and February 11, 1981 responses described above. Nor does he mention the subsequent negotiating sessions also described above, in which these matters were again discussed.

[54] According to the judge's summation, Diederich explained that the Respondent did not know whether the Union's September 23, 1980 request was for the maximum of each classification or the maximum any employee in that classification was receiving. This is inconsistent with Miller's credited testimony concerning the bargaining session 17 (January 21, 1981). According to that testimony, in the Respondent's September 29, 1980, response, the ''top rates'' (the most any employee in a classification received) were provided because that is the information the Respondent believed the Union was requesting.

January 21, 1981 submission, which were explained by the Respondent in bargaining sessions and were supported by the Stanton study.

For these reasons, we find the General Counsel has failed to demonstrate that the maximum wage rates provided by the Respondent were inaccurate or that the Respondent supplied conflicting information. We, accordingly, dismiss this allegation of the complaint.

D. *Alleged Refusal to Provide Tour*

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union a timely tour of the plant on its October 7, 1980 request. The Respondent admits it had a duty to provide the union representative a tour of the plant on request but denies that it received such a request until July 10, 1981. We agree.

According to Diederich's notes of the October 7, 1980 negotiating session, after he read the Respondent's proposal on the visitation rights of the union representative, Union Negotiators Miller and Painter stated they wanted to tour the plant sometime when it was convenient for the Respondent. According to Diederich, he interpreted this statement only as an aside, not a request, and he did not respond. The judge found and the Respondent acknowledged that comments of a similar nature were repeated. Thus, on October 15, 1980, in reply to Diederich's inquiry about where a proposed bulletin board would be, Miller answered, ''after I have gone through the plant, I will have a better idea about that.'' On December 11, 1980, Miller stated that ''sometime when it was convenient he would like to come in and see the plant in operation and could we work something out.'' The judge credited Diederich that he responded this could be arranged although he expressed concern to Miller that any possible disruptions be controlled. At the June 24, 1981 session, Miller said he wanted to see a particular machine in operation, to which Diederich replied, ''fine.'' An argument then followed about whether the Union had made earlier requests for tours that had been refused. Diederich stated the Respondent had no objection and that the Union should make a specific request rather than off-the-cuff remarks. In a July 10, 1981 letter, the Union made what the Respondent concedes was a specific request ''that U.E. Field Organizer Kathy Laskowitz, one of the Chief Stewards and (Miller) be allowed to tour the Sioux Falls plant at (the Respondent's) earliest convenience.'' The Respondent permitted this tour soon afterward.

The judge found no meaningful difference between the written and oral requests. On that basis, he concluded that the Respondent's delay until after the July 10, 1981 request was an unlawful delay in furnishing information in violation of Section 8(a)(5).

We agree with the Respondent that the October 7, 1980 comments and later statements did not amount to explicit requests and that the Respondent's inaction until the written July 10, 1981 request was therefore justified. Thus, on October 7, 1980, immediately after discussion of the visitation provision, the Union representatives stated they wanted to tour the plant ''sometime'' at the Respondent's convenience. The Union's choice of language indicates that the comment was more in the nature of an aside, and we find that Diederich did not respond unreasonably in so interpreting it. That the union representatives did not pursue the matter when Diederich did not respond further indicates the nonspecific nature of their comments. The October 15 and December 11, 1980 union statements were similarly nonspecific and the Union did not follow up on them. We do not agree with the judge's implication that it was incumbent on the Respondent to arrange a tour of the plant on what does not reasonably amount to more than an expression of interest. The Respondent by its silence did nothing to foreclose or discourage the Union's option to pursue this interest more actively. This is further evidenced by the Respondent's prompt compliance in July 1981 when presented with a specific request. Accordingly, we find that the Respondent's conduct in this matter was not in violation of Section 8(a)(5) of the Act.

THE REMEDY

Having found the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully withheld the February 1981 increases from the employees, we shall order the Respondent to rescind this unilateral change and pay to all bargaining unit employees the wage increase which would have been payable beginning February 1, 1981, as prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*,[55] and shall maintain the February increases in effect until August 3, 1981, the date on which the Respondent lawfully implemented its final offer on wages. The amount of these increases may be determined at the compliance stage of this proceeding.

Having further found that the Respondent unlawfully, in December 1981, unilaterally eliminated the extra paid half hour for lunch on the day before Christmas, we shall order the Respondent to rescind this change also, and to make whole any employee who may have suffered losses in wages or benefits as a re-

[55] 283 NLRB 1173 (1987).

sult of this unilateral change, plus interest as described above.

Further, having found the Respondent also to have violated Section 8(a)(5) and (1) by unilaterally changing its rule about employee meetings in the cafeteria and on the patio, we shall order it also to rescind those changes.

Finally, having found that the Respondent violated Section 8(a)(3) and (1) by issuing warning notices to employees Judy Lawson, Mark Hubert, and John Hassara, and by issuing warning notices to Lawson and Hubert on April 22, 1981, we shall order it to remove from its files any record of the above-described disciplinary action, and to notify these individuals, in writing, that this action has been taken and that evidence of the disciplinary action found unlawful will not be used against them in any way, in accord with *Sterling Sugars*, 261 NLRB 472 (1982).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Sioux Falls, South Dakota, facility, including leadpersons, assemblers, adjusters, manufacturing technicians, shipping and receiving clerks, material handlers, schedulers, production control coordinators, dispatchers, cycle counters, locator clerks, inventory coordinators, inventory analysts, inventory clerks, engineering change notice analysts, receiving inspectors, senior receiving inspectors, R.F. meter checkers, quality control technicians, auditors, manufacturing engineering technicians, new models coordinators, mechanics, tool crib clerks, and custodians; excluding office clerical employees, professional employees, and guards and supervisors as defined in the Act.

4. At all times material the Union has been the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3 of this section.

5. The Respondent has violated Section 8(a)(1) of the Act by the following acts and conduct:

(a) Moeller's directive to Hubert to cease talking about the Union on company time, thereby promulgating a discriminatory as well as overly broad no-solicitation rule by that action.

(b) Kozel's interrogation of Dunkelberger.

(c) Klaus' instructing Jungen not to discuss the Union while ''on the line'' and threatening him with discipline for doing so, while permitting other discussions during working and nonworking time.

(d) Abraham's discriminatorily instructing Dickens not to discuss the Union on the production floor during breaks.

(e) Abraham's discriminatorily instructing Roe not to discuss the Union on the production floor at any time.

6. The Respondent has violated Section 8(a)(3) and (1) of the Act by issuing warning notices on April 21, 1981, to employees Judy Lawson, Mark Hubert, and John Hassara, and by issuing warning notices to Lawson and Hubert on April 22, 1981, including to the extent those latter notices disciplined the employees for disregarding the instructions of the secretary to Director of Operations Michael Dolen to wait before going in to speak to him, and for refusing to change their timecards to reflect the time they spend in discussions with Dolen and Materials Manager Ori, because the employees engaged in union and protected concerted activity.

7. The Respondent has violated Section 8(a)(5) and (1) by unlawfully taking unilateral actions, or actions without notice to and bargaining with the Union on the following topics: a wage increase in February 1981; rules regarding the holding of meetings on nonworking time in nonworking areas; or its provision of an extra paid half hour for lunch on the day before Christmas 1981.

8. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. All other allegations of the complaint are without merit.

ORDER

The Respondent, Litton Microwave Cooking Products, Division of Litton Systems, Inc., Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about United Electrical, Radio and Machine Workers of America (UE) or protected concerted activities.

(b) Instructing employees not to discuss the Union or other protected concerted activity on company time or on the production floor during breaks or at any time and by announcing such a rule while permitting employees to engage in other types of discussions during working and nonworking time.

(c) Instructing employees not to discuss the Union while ''on the line'' or threatening them with discipline for doing so, while permitting employees to engage in other types of discussions during working and nonworking time.

(d) Issuing warning notices or dispensing any other form of discipline of employees because they have engaged in union or protected concerted activities.

(e) Refusing to bargain collectively with the Union as the exclusive representative of the employees in the unit described above by making unilateral changes in wages, hours, or other terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all bargaining unit employees employed at the time for its withholding of the February 1981 wage increases, and the recission of the extra paid half hour for lunch the day before Christmas 1981, as provided in the remedy section of this decision, and rescind these unilateral changes as well as those made regarding the rules about employees' meetings in the cafeteria and the patio.

(b) Remove from its files any record of disciplinary action taken against Judy Lawson, John Hassara, and Mark Hubert on April 21, 1981, and against Lawson and Hubert on April 22, 1981, and notify these individuals, in writing, that this action has been taken and that evidence of the action found unlawful will not be used against them in anyway.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Respondent's Sioux Falls, South Dakota plant copies of the attached notice marked ''Appendix.''[56] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[56] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their activities on behalf of United Electrical, Radio and Machine Workers of America (UE) or about other protected concerted activities under the National Labor Relations Act.

WE WILL NOT instruct our employees not to discuss the Union or other protected concerted activities during company time or on the production floor during breaks or at any time, or announce such a rule while permitting employees to engage in other types of discussions during working or nonworking time.

WE WILL NOT instruct our employees not to discuss the Union while ''on the line,'' or threaten them with discipline for doing so, while permitting employees to engage in other types of discussions during working and nonworking time.

WE WILL NOT issue warning notices or dispense any other form of discipline to employees because they have engaged in union or protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive representative of the employees in the following bargaining unit by making unilateral changes in wages, hours, or other terms and conditions of employment:

> All full-time and regular part-time production and maintenance employees employed by us at our Sioux Falls, South Dakota, facility, including leadpersons, assemblers, adjusters, manufacturing technicians, shipping and receiving clerks, material handlers, schedulers, production control coordinators, dispatchers, cycle counters, locator clerks, inventory coordinators, inventory analysts, inventory clerks, engineering change notice analysts, receiving inspectors, senior receiving inspectors, R.F. meter checkers, quality control

technicians, auditors, manufacturing engineering technicians, new models coordinators, mechanics, tool crib clerks, and custodians; excluding office clerical employees, professional employees, and guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files any record of disciplinary action taken against Judy Lawson, John Hassara, and Mark Hubert on April 21, 1981, and against Lawson and Hubert on April 22, 1981, and notify these individuals, in writing, that this action has been taken and that evidence of our disciplinary action found unlawful under the Act will not be used against them in any way.

WE WILL reimburse, with interest, the employees in the unit described above for any monetary losses they have suffered as a result of our failure to grant them wage increases in February 1981, and the extra paid half hour for lunch the day before Christmas 1981.

WE WILL rescind those unilateral changes, and our further unilateral changes in the rules about employee meetings in the cafeteria and on the patio.

LITTON MICROWAVE COOKING PRODUCTS, DIVISION OF LITTON SYSTEMS, INC.

James Fox, Robert D. Johnson, and *Everett Rotenberry, Esqs.*, for the General Counsel.
Francis X. Dee, Esq., of Newark, New Jersey, for the Respondent.
Ralph E. Kennedy, Esq., of Northridge, California, for the Respondent.
Leonard Polletta, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter was tried before me on 67 different dates between March 9, 1982, and January 26, 1983.[1] General Counsel issued four complaints (complaint) against Litton Microwave Cooking Products Division of Litton Systems, Inc. (Respondent, the Employer, or the Company) upon charges filed by United Electrical Radio and Machine Workers of America (the Charging Party or the Union).[2] The Complaints allege several violations by Respondent of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent filed answers to the complaints, admitting jurisdiction, status of the labor organization involved, and the status of several supervisors under the Act, but denying the commission of any unfair labor practices within the meaning of the Act.

Upon the record as a whole, including my observations of the witnesses and upon consideration of oral arguments made at the hearing and briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation located in Sioux Falls, South Dakota, and Minneapolis, Minnesota. Respondent annually ships and delivers from its Sioux Falls plant products, goods, and materials valued in excess of $50,000 directly to purchasers located in States of the United States other than South Dakota. Therefore, Respondent is now, and has been at all times material herein, an employer engage in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

United Electrical, Radio and Machine Workers of America (UE) is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Individuals Involved*

Respondent manufactures microwave cooking products at two plants, one in Minneapolis and the other in Sioux Falls. The Minneapolis plant (Minneapolis) has been in existence for many years; the Sioux Falls plant was completed in April 1977. At the Sioux Falls plant Respondent manufactures only countertop ovens, a product which was once manufactured at the Minneapolis plant. The production and maintenance employees of the Minneapolis plant have been represented by Local 1139 of the Charging Party for several years; the production and maintenance employees of the Sioux Falls plant have been represented by the Charging Party since September 19, 1981, when it was certified as winner of an election conducted by the Board on September 11, 1981. Received in evidence was a contract, effective from October 1, 1979, to October 31, 1982, between Local 1139 and Respondent at Minneapolis. The Union and Respondent have yet to negotiate an initial contract at Sioux Falls, and the negotiations for such contract are a subject of the complaint.

The bulk of the Sioux Falls unit employees work on production lines designated ''white,'' ''green,'' etc. Each production line has one immediate supervisor and one or two group leaders; the group leaders are not supervisors within Section 2(11) of the Act. The employee complement fluctuates between 600 and 900 employees throughout the year. The peak is usually reached in the autumn when retailers are stocking for the Christmas season. The need for workers fluctuates radically; Respondent has hired as many as 100 employees in a day, and layoffs are common. Ninety percent of the employees are classified as assemblers. The only skill required of the assemblers is manual dexterity.

[1] Pagination of the last two volumes of the transcript is reversed; the proceedings of January 25, 1983, are reported at pages 12,551 through 12,729, and the proceedings of January 26, 1983, are reported at pages 12,413 through 12,513.

[2] The original charges and dates of complaints are: In case 18–CA–7065, the charge was filed on January 30, 1981, and complaint issued on May 13, 1981; in Case 18–CA–7325, the charge was filed on July 7, 1981, and complaint issued on September 24, 1981; in Case 18–CA–7402, the charge was filed on September 3, 1981, and complaint issued on November 13, 1981; the charge in Case 18–CA–7573 was filed on February 1, 1982, and complaint issued on March 31, 1982.

Mathias J. Diederich is vice president of labor relations for Litton Industries, Inc. Diederich was admitted to the bar in 1957 and since then he has practiced only labor law on behalf of management. When the Sioux Falls petition for election was filed, Diederich immediately became involved. He negotiated a Stipulation for Certification Upon Consent Election with the Union and the Regional Office and later gave speeches to employees and advised management on the conduct of its campaign in the election. Since certification Diederich has been the chief negotiator for Respondent. The speeches given by Diederich, in tandem with R. G. Lee who is also an employee of Litton Industries, are subjects of 8(a)(1) allegations of the complaint. Diederich's conduct as chief negotiator during the bargaining is the subject of 8(a)(5) allegations of surface bargaining, or bargaining without intent to reach an agreement.

Michael Dolen is the director of operations of the Sioux Falls plant. As such, according to Dolen, he is responsible for all phases of the manufacturing operations of the plant. Dolen assumed his position in November 1979 at which time he succeeded Joe Rainey (who did not testify). Immediately subordinate to Dolen in the area of personnel matters is Steve Virag, manager of human resources. According to Virag he is responsible for ''all the personnel, human relation functions there at the plant—employment, hiring, personnel records, benefits administration, cafeteria services, job postings, things of that nature—health services.''

Other individuals who are supervisors or are identified with management and called to testify on behalf of Respondent are as follows:

Steven Abraham—Production supervisor in the electronic assembly area
James Ahrendt—Manufacturing superintendent
Lynette Anderson—Supervisor of the green line
Gregory Blondell—Manufacturing superintendent
Linda Carda—Personal secretary to Dolen
Earl Erpelding—Supervisor of auditors (production inspectors)
Loxie Johnson—Supervisor of green line and wrap area
Dennis Kiepke—Lead Supervisor of the electronics department
Jude Klaus—Supervisor in the wire area
Roger Kozil—Quality control engineer
Jackie Moeller—Department supervisor
Richard G. Ori—Materials manager
James W. Parker—Plant engineering manager
Margaret Pekoske—Supervisor of the green line
Daryl Rotezel—Plant controller
Delbert Sellnow—Superintendent of manufacturing electronics
Marlene Ziegler—Group leader (nonsupervisory) in the wire assembly area

Joseph Miller is an International representative for the Charging Party. Miller was the chief agent of the Charging Party during the campaign. During the campaign and subsequent negotiations Miller was responsible for communicating to the employees the positions of the Union on actual and potential issues. To do this Miller caused to be published a series of broadsides each of which was called ''The Eye Opener.''

After the Union won the election, Miller was also its chief negotiator for the Union. Miller had different assistants in the campaign and during the negotiations, but principally involved were Carol Lambiase and Kathy Laskowitz who were also employees of the Charging Party.

After the International of the Charging Party was certified as the bargaining agent of the production employees, Local 1180 was formed. The Charging Party throughout negotiations attempted to secure recognition of the Local as a bargaining agent, but the Respondent refused. After the election the Union elected stewards and chief stewards although there was no negotiated grievance procedure. Respondent's agents (chiefly Virag) dealt with the stewards as plant spokesmen of the employees, but still never conceded that they were acting on behalf of the Local rather than the International.

B. *Preelection 8(a)(1) Allegations*

1. Speeches by Diederich and Lee

a. *Facts*

The complaint, as amended, alleges that from about August 7 to September 11, 1980, Respondent, in a series of meetings, ''informed employees that selection of the Union as their collective-bargaining agent was a futility and that the facility would be closed in the event the Union was so [sic] selected.'' In support of this allegation General Counsel called three employees: Elizabeth Nord, Cleo Roe, and Leah Meyer.

Meyer, who was employed by the Respondent at the time she testified, stated that she attended three meetings in a 2-week period before the election. According to Meyer, at the first meeting Bob Lee was introduced to the employees by Virag. The other two meetings were conducted by Lee, but Meyer testified only about one.[3] According to Meyer: Lee had a chart which listed Litton companies and the weeks they had been on strike. Some plants listed on the charts were circled in red because ''they had been permanently closed because the union had made demands and the Company found it more economical to shut them down.'' Lee mentioned that one of the plants had manufactured motors until a strike at which time Litton found out it could purchase motors more cheaply from a company in Japan. Lee stated that, if the Union did win, all that Respondent was required to do was attend the bargaining meetings in good faith and that the Company ''did not have to agree to anything that would interfere with their ability to make profits.'' Lee said that the way unions usually work was that they would ''bargain away some of your existing benefits so that they could get something the union considered more important, such as dues checkoff.'' Finally, Meyer testified that Lee told the employees that Respondent had won a recent strike at Minneapolis plant ''because the Union came out of it with

[3] On direct examination, Meyer acknowledged that she could not separate in her own mind what Lee said at which meeting. Meyer first testified as to what she thought had been said in Lee's first meeting as he utilized a chart showing various Litton companies and how long they had stayed out on strike. Then Meyer stated that the charts were used in a second meeting and testified as to what she recalled being said then. Meyer was not thereafter asked on direct examination what she could then remember that Lee had said in his first meeting. Therefore Meyer in actuality only testified about one meeting she attended in which Lee gave a speech.

less than they had, they went into with [sic] they bargained away some of their benefits.''

On cross-examination, Meyer testified that there were about 40 other employees in each of the meetings she attended. She acknowledged that Lee had said that the Company could not make any threats or promises; that when Lee talked about closing the plants it was based on sheer economics; he never made the statement that the Sioux Falls plant might close if the employees went out on strike; and that Lee stated that the Company was required by law to bargain in good faith. Meyer acknowledged further on cross-examination that Lee ''said they would attend the meetings in good faith and that was all they were required to do by law.''

Roe, who was employed by Respondent at the time of trial, testified that during the week before the election Lee came to the electronics department where she worked when no other supervisors were present. According to Roe, Lee told the employees that Respondent was surprised that the employees in the electronics department (then consisting of 25 to 30 employees) were so prounion and antiemployer because they were mostly long-service employees. According to Roe, Lee then stated:

> If we chose to go with the Union, he would be back here to negotiate a contract and that he would be anxious to see how happy we were with—he would like to come back in a year we were with the Union, in comparison with what we had before the Union was brought in. . . . That everything that we now had would be eliminated or we would start from scratch. We would have nothing and we would have to negotiate for anything that we got, any benefits. We would start with a clean slate.

Roe testified that in the week before the election she attended two meetings conducted by Diederich and Lee together. In the first meeting, Diederich had a chart which depicted a road which forked. One of the branches went toward a castle-like drawing labeled ''Litton.'' The other fork was denoted as ''UE.'' According to Roe:

> That if we chose to go down the road towards Litton, we would have these benefits that we now enjoyed and that, if we chose to go that the other road, there was nothing there for us, that there were [no] guarantees going down that road.

Finally, according to Roe, Diederich said that if the employees chose the road going ''toward the UE'' he would return to negotiate the contract. Roe could remember essentially nothing of the second meeting which she claimed to have been conducted by Lee and Diederich together.

On cross-examination, Roe was asked if during the meeting in the electronics department Lee stated that the company would negotiate in good faith and that negotiating is a two-way street. Roe said that she could not recall such statements but would not deny that such statements were made.

Elizabeth Nord, who was also employed by Respondent at the time of trial testified that during the 6-week period prior to the election she attended two meetings a week conducted by Diederich or Lee, or both. At the beginning of her testimony on direct Nord attempted to segregate what Lee said from what Diederich said, and further attempted to distinguish what had happened in earlier meetings as opposed to later ones. This attempt quickly broke down (and on cross-examination completely dissolved). Nord first testified that about 6 weeks before the election Diederich told a meeting of employees that

> if the Union were to be voted in we would not necessarily get what we wanted; and if we did not get what we wanted, we would probably go strike; and he said if we went on strike, it would not hurt one bit. . . . He just indicated that they were a big enough company to handle a strike: and as a scare tactic, it would not scare them one bit. . . . He said if we were going to strike and they were to find other people to replace us while we were on strike and if the strike ended, that if our jobs have been replaced by other people, we have lost our job.

Nord further testified that Diederich had a ''big poster board'' upon which he had referred to ''other [Litton-owned] companies, what happened and how they shut them down.'' Nord did not testify on direct examination that the other plants had been shut down because of the union activities of the employees. Nord further testified that Diederich used a poster board showing a road which forked, one branch going to a ''Disney-like castle'' and the other ''kind of ended.'' She testified that Diederich said it would better for the employees to take the road to the castle ''rather than taking the road to the right not knowing where it went to.'' Nord further testified that Diederich at one meeting held up a blank tablet and stated ''this is what your contract looks like . . . with the Union.''

Nord further testified that at the last meeting before the election both Lee and Diederich were present. She testified that Lee told the employees that he was summarizing all the things he had said in previous meetings and wanted to discuss strikes especially. Lee told the employees that going with the Union ''was no piece of cake . . . he was talking about strikes that had lasted for long period of times, like 6 and 8 months and how the people were really suffering, and that at one of the plants he went back to—a girl approached him and said, 'you did not tell us about the part, Bob' . . . he just said he wanted to make sure that everyone knew that a strike and going with the Union was not an easy way to go.''

Nord further testified on direct examination that at one meeting one employee asked why the Company was discriminating by not asking some prounion employees to come to their speeches. Lee replied that those employees would just start arguments and that later ''he would invite all those people up to this room and lock the doors and maybe turn the gas on.'' Employee Roe testified to the ''gas'' remark by Lee but stated that he did so in a laughing manner. Nord acknowledged the same thing in her pretrial affidavit. It is clear that Lee was joking and the employees would have taken it as such.

Nord further testified that in one meeting which Lee spoke to the employees he stated that if the Union won the election ''that all they had to do was sit down and negotiate in good faith, they did not have to give the Union anything . . . and that the first thing the Union wanted was dues checkoff and

in order to give them that, the Company would, therefore, take something away because this would tie up their computers and just be a burden for the Company . . . .'' Further according to Nord ''then he went across some of the things they would maybe take off in exchange for the Union dues checkoff'' or bargain away Respondent's program which gave employees 12 paid sick days a year at full salary.

On cross-examination (which took place the day after her direct) Nord changed her testimony by ascribing much of which had attributed to Diederich to Lee, and vice versa. She acknowledged that Lee's statement about the gas was a joke, but could not explain why she had not said so on direct except to say she had been nervous the day before. She testified on cross-examination that both Lee and Diederich talked about strikes and the speeches she attended. She acknowledged that Diederich said ''replacements stay and that when and if there was room that we would be called back'' in the event of a strike.

Nord further acknowledged on cross-examination, or at least refused to deny, that Lee and/or Diederich stated: That the Company would not be making any threats or promises and that although the Union had led the employees to believe that wages and benefits could only go up in negotiations, ''that all they had to do was bargain in good faith''; that bargaining is a ''two-way street'' and ''what really happens is that if the Union wins the election you come to the bargaining table with all your benefits and they get put on the table for negotiations.'' Diederich or Lee further stated ''after good faith negotiations these wages and benefits could be improved . . . some might not change at all and others could be eliminated . . . .'' She further acknowledged that Diederich and/or Lee stated that checkoff is one thing the Union might want and it could be traded for such things as sick days or holidays or insurance. Nord further acknowledged that Diederich said that ''business people'' would not close a plant just because it was unionized, and the list of plants he had displayed on one poster were ''closed for economic reasons.'' She would not deny that on the poster that showed a castle, one fork in the road led to a square building rather than ''kind of ended.''

b. *Conclusions*

Because of the many conflicts in the testimony of these three employees, I can credit none of them. Clearly they were advancing expressions of impressions, but could not remember any precise statement of Lee or Diederich made in the speeches given some 18 months before they testified. Alternatively, Charging Party[4] relies on the testimony of Diederich and Lee and argues that the overall impact of the speeches, as related by the speakers, would convey the impression of futility in selecting the Union as the collective-bargaining agent and contained an implied threat to close Respondent's plant if the Union were selected as a collective-bargaining representative.

Diederich did make a reference to ''bargaining from scratch'' in some of his speeches. Such references have been found violative where there is an expressed or implied threat to take from employees that which they had enjoyed before without organizational attempts and that it would be up to the Union to get those benefits restored at the bargaining table. However, that was not the impression that reasonably would have been created by the speeches. Diederich referred to a union leaflet which had issued before his speech that said: ''Our Union doesn't bargain from scratch in negotiations. We began where we are now and improve the wages and benefits.'' Diederich told the employees that bargaining was a ''two way street'' and benefits can be lost as well as gained, in the bargaining process. Charging Party argues that Diederich made a threat to close Respondent's plant by using a chart which listed Litton plants which had closed, some of which had unions and some which did not. Diederich told the employees that whether each plant had a union was not controlling; the plants were closed because of economic conditions. This statement by Diederich was more in reply to a representation by the Union that it was needed by the employees to guarantee job security. It was not a threat to close any plant; if anything, there was a statement that many Litton plants which had unions were still open.

In this context I find no threat or unlawful statement of futility in the speeches given by Lee and Diederich and I shall recommend dismissal of this allegation of the complaint.

2. Moeller-Hubert threats

At the time of the hearing Mark Hubert was employed by Respondent as a production employee in the magnetron section. He had been employed since December 5, 1979, and, beginning in August 1980, he began making speeches for the Union in the cafeteria, wearing organizing buttons and union T-shirts, passing out union authorization cards, passing out ''Eye Openers,'' and helping in any other way he could to organize the employees. He held several union offices including sargent-at-arms, steward, chief steward, and, at the time he testified, president of the Local, a position he had held since January 1982. After the election Hubert served on the Union's negotiating committee from the start.

The complaint alleges that during August 1980, Respondent by its Supervisor Jackie Moeller warned an employee against engaging in activities on behalf of the Union. In support of this allegation General Counsel advanced the testimony of Hubert that about 2 weeks before the election he gave a prounion speech in the plant cafeteria at a time when Moeller was present. According to Hubert, during the next morning, while he was at his work station, Moeller approached him and asked him to step outside the workroom. There, according to Hubert:

> Jackie said that they were watching me and to be careful. I did not understand her right away. I said, ''what do you mean?'' She said, ''I want you to be careful what you say and what you do because we are watching you.'' She said now, ''go back to work.'' I returned and went back to work.

Moeller testified that once during the summer of 1980 she observed Hubert several times ''talking and not working.'' At the end of the day she asked her group leader for Hubert's production figures and the group leader replied that Hubert had produced 135 units that day. The quota for the day in that department, according to Moeller, was 150 units per day. According to Moeller she approached Rubert and:

[4] Counsel for General Counsel does not mention the speeches in his brief.

> I had told him I have seen him several times talking—I mean, just standing around and not working and he said, ''What time was it?'' I said, ''I didn't take the exact time, but if it happens again the next time I will.'' I had told him that he knew what his—you know, what he was supposed to be putting out and what he hadn't . . . [h]e said that he had some bad screens. I said ''now if you had taken the time that you were standing there and not working, then you would have been able to put out 150.''

To the extent they differ, I credit Moeller. Of all the employees in an employee complement in excess of 600, Mark Hubert was easily the most active on behalf of the Union. There is no logical suggestion as to why the Employer would engage in some surreptitious surveillance suggested by Hubert's account of Moeller's alleged warning. Even if such surveillance were to be undertaken, there is no explanation as to why Moeller would alert Hubert to be on guard. Finally, on this point, Moeller impressed me as the more credible witness. Therefore, I shall recommend that this allegation of the complaint be dismissed.

The complaint further alleges that between August 7 and September 9, 1980, Moeller told an employee that employees were prohibited from talking about the Union during nonworktimes. In support of this allegation Hubert testified that no more than 2 weeks before the September 11 election Moeller brought employee Debbie Hallen to work in the lamination area because the department was short one person that day. Hubert testified that he and employee Judy Lawson talked to Hallen that day about why she should join the Union. At the end of the day Moeller transferred Hallen back to another area. According to Hubert, after Moeller had taken Hallen back to her original area, Moeller approached him and said: ''I hear you have been talking to people on company time, and I respect your right to talk to people about the Union but don't do it on company time.''

This testimony by Hubert was undenied. The employees received two paid breaks per day at this time and the proscription against soliciting ''on company time'' is an overly broad proscription of their union activity. Accordingly, I conclude that the directive of Moeller to Hubert constituted a violation of Section 8(a)(1) on the part of Respondent. Moreover, since it is undisputed that employees were otherwise permitted to talk about anything they wished during working time, Moeller's directive constituted a discriminatory no-solicitation rule in further violation of Section 8(a)(1) of the Act.

3. Kozel-Dunkelberger interrogation

The complaint alleges that in August 1980, Roger Kozel interrogated an employee about the Union. In support of this allegation General Counsel called Silvia Dunkelberger who was hired by Respondent in May 1977 but quit her job November 22, 1980. At the time of the alleged violation Dunkelberger occupied the position of production auditor (which is essentially an inspector's job). Kozel was Dunkelberger's supervisor until August 8. On August 6 Dunkelberger received her semiannual performance review. Dunkleberger testified that she was called to Kozel's cubicle on the production floor for that purpose and Kozel went over her past performance in the usual manner. Dunkleberger further testified that at the end of the evaluation she got up to leave and:

> [Kozel said] ''Silvia, I would like to talk to you about the Union,'' and I told him I would rather not. He said, ''Well, I would like to have you give your views and then I would give you mine on the Union.'' I said I would still rather not talk to him about it. He said, ''all I am asking you is just a few minutes where you will give me your views and I would give you mine.'' I finally said, ''all right.''

Dunkleberger then told Kozel her views enumerating several complaints she and other employees had regarding terms and conditions of employment at the plant. Dunkelberger testified that when she finished Kozel related several of his past experiences with unions and commented negatively on those experiences.

Kozel acknowledged raising the topic of unions in the conversation but denied interrogating Dunkelberger in any regard, including specifically telling her that he wanted to hear her views and then he would tell her his.

I credit Dunkelberger. She had a clear and distinct recollection of the facts of the conversation, withstood a rigorous cross-examination, and appeared more credible than Kozel. Accordingly, I find that by the conduct of Kozel Respondent interrogated Dunkelberger on August 6, 1980, and I conclude that this action violated Section 8(a)(1) of the Act.

4. Blondell-Lawson comment

The complaint alleges that in August 1980 Respondent, by Blondell, ''told employees that Respondent would regard favorably employees' suggestions for changes in job assignment procedures.'' In support of this allegation General Counsel called Judy Lawson who was employed by Respondent in October 1978 and discharged on May 28, 1981. (The discharge is the subject of an allegation of the complaint dealt with below.) According to Lawson in late August she was in the production area doing no work because she, Mark Hubert, and others who were strongly for the Union were excluded from one of Respondent's campaign meetings. Lawson testified that Blondell joined the conversation and unions were discussed. Lawson told Blondell that Respondent should be making certain job assignments by seniority. According to Lawson, Blondell replied, ''Yes, that is a good idea. The Company is in the process of writing a new handbook and I am going to suggest that that be put into the new handbook.''

Blondell credibly denied making any such statement. Even if it had been made, the alleged statement contains no element of interference, restraint, or coercion in violation of Section 8(a)(1). Accordingly, I shall recommend dismissal of this allegation.

5. Failing to increase medical insurance premiums

The complaint alleges that in August 1980: ''Respondent granted a benefit to employees in order to influence employees to vote against representation by the Union by not requiring its employees to pay increases in medical insurance premiums when they became effective.'' As discussed below Respondent increased the deduction for medical insurance premiums in November. At that time Respondent told agents

of the Union that the increases had actually been imposed in August but were not then passed along. There is no suggestion by General Counsel that the employees knew in August, or at any time before the election, that Respondent was not passing along the increased insurance costs. Accordingly, there is no element of interference, restraint, or coercion in the failure to increase insurance premiums, and I shall recommend dismissal of this allegation.

6. Moeller-Hubert discipline

The complaint alleges that on August 27, 1980, Respondent discriminatorily enforced a rule prohibiting distribution of materials ''on Company time,'' by Supervisor Jackie Moeller's issuance of a warning notice to Mark Hubert. In support of this allegation General Counsel called Hubert to testify that on August 27, at a time when he was working, he stopped what he was doing and walked at least 25 feet away from his work station to hand employee Carrie Dickens some union literature. This act was witnessed by Supervisor Loxie Johnson who reported the matter to Superintendent Blondell. Blondell directed that a warning notice be issued by Moeller, and a warning notice was delivered to Hubert that date. General Counsel called several employees to testify that they had distributed written materials such as recipes in the work area with impunity. However, none of the employees could credibly testify that any supervisor witnessed such distribution; moreover, there is no testimony by the employees that they actually stopped their work to distribute the literature.

General Counsel does not argue that employees have a right to stop their work to distribute literature, as did Hubert, just because some other distributions had occurred in the work area in the past. Hubert's activity is plainly distinguishable from that of the other employees called by General Counsel. Therefore, General Counsel has failed to prove that Respondent discriminated against Hubert by its warning of August 27, 1980, and I shall accordingly recommend dismissal of this allegation of the complaint.

7. Blondell-Oren warning

Pat Oren was employed as a production worker by Respondent until August 6, 1980, at which time she was fired. She was fired for going to one of Respondent's campaign meetings when she was told not to,[5] and the discharge is not an alleged violation. What is alleged is that during her discharge interview Manufacturing Superintendent Blondell informed her that ''it was against the law to talk about the Union or distribute materials in support of the Union.'' In support of this allegation Oren testified that she had an argument with both Blondell and her immediate Supervisor Rose Illman about whether she deserved to be fired for attending the meeting. Oren testified that at one point in the long arguments when Illman was out of the room:

> He [Blondell] also told me that, didn't I know that it was illegal to pass out union buttons, union brochures or even talk about Litton or talk about the Union at Litton and I did not say anything to him.

It would serve no purpose to quote the extensive Blondell-Oren argument recited by Oren in her testimony. It suffices to say that this quote was neither preceded nor followed by any reference to any type of union activity. In effect, I am asked to agree that Blondell ''out of the blue'' interjected an unquestionably illegal instruction to an employee who was being discharged. Oren had been excluded from the meeting because she was so prounion. It defies credulity too much to think that Blondell would gratuitously interject a patently illegal instruction while discharging one of the more active union adherents for (unprotected) union activities. I recognize that not all threats are couched in smooth syntax; however, Oren's testimony is too much to believe, and I do not. Accordingly, for these reasons, and because Blondell credibly denied the statement attributed to him by Oren, I shall recommend dismissal of this allegation of the complaint.

C. *Postelection 8(a)(1) and (3) Allegations*

1. Ziegler-Hartz interrogation

The complaint alleges that during the week of October 20, 1980, Supervisor Marlene Ziegler questioned an employee about the Union. In support of this allegation General Counsel called Shellee Hartz. At the time she testified Hartz had been discharged by Respondent but showed no apparent anger over the fact. In October 1980, she worked in subassembly under the supervision of Ziegler. According to Hartz, once during late October she approached Ziegler and asked if she could go to see the nurse. At the time Hartz was wearing a union button and pin. According to Hartz:

> Well, I walked up to her; and before I said anything, she turned around and asked me what I thought of the Union, and I turned and I told her I was not for it and I was not against it. Then she asked me what I wanted. I just told her to go see the nurse . . . then she let me go to the nurse.

Ziegler testified that during this period of time Hartz asked her on several occasions to go see the nurse. Ziegler denied ever using such an opportunity to question Hartz about the Union. I found Ziegler to be the more credible witness. Additionally, the Union had already won the election and bargaining had begun; therefore, there would have been no point in interrogating an employee about her sympathy, especially one who was wearing two union insignia. Finally, Hartz' testimony that she replied that she was not for or against the Union is implausible because of her wearing of that insignia. Accordingly, I shall recommend dismissal of this allegation of the complaint.

2. Removal of literature

The complaint alleges that during the month of October 1980 one of Respondent's guards removed some union literature from the cafeteria while leaving literature unfavorable to the Union. In support of this allegation General Counsel called former employee Silvia Dunkelberger. Dunkelberger, who was president of the Union at the time, testified that on October 9 issues of ''The Eye Opener'' had been distributed to employees earlier in the day and at lunch many were lying on tables in the cafeteria. Also lying on the tables were forms distributed by individuals opposed to the Union.

[5] Respondent excluded from the Diederich-Lee campaign meetings those employees who had openly expressed strong prounion feelings.

Dunkelberger testified that at the lunchbreak a guard walked the length of the cafeteria picking up copies of ''The Eye Opener'' while leaving the antiunion material on the tables. Guards did this only at tables at which there were no employees eating their lunches; he passed by occupied tables without picking up anything.

To refute this allegation Respondent produced Willis E. Wibbin, security supervisor for Midwest Securities Systems, a contract security service used at the plant. Wibbin testified that he was on duty on October 9 and had ''no doubt'' that he was in the cafeteria on that day because that is part of his usual rounds. Wibbin credibly denied picking up any papers himself. He further testified that the other guard on duty was Dave Stellenwerf. Stellenwerf could not testify because he was seriously ill at time of trial.

Assuming it was Stellenwerf whom Dunkelberger saw, ''The Eye Openers'' were produced almost daily by the Union and there is no evidence that Stellenwerf's picking up of some of them on that one day had any coercive impact on the employees. Certainly it did not decrease the production of ''The Eye Opener,'' nor did it inhibit the distribution of the literature. Moreover, there is no evidence that Respondent authorized or condoned this action of Stellenwerf who was not its supervisor, or even its employee. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

3. Klaus-Jungen threat

The complaint alleges that in November 1980 Supervisor Jude Klaus instructed employees not to talk about the Union in work areas and threatened discipline for violating that instruction. At the time of the alleged violation Klaus was the supervisor of the white line. Reporting to her were group leaders Angelia Reisdorfer, Karen Heineminn, and Judy Jungen. In support of the allegation General Counsel called Jungen who testified that she and other employees on the line regularly talked about ''food, clothing, sex, union'' and anything else while working. However, according to Jungen, in late November Klaus called her and the other two group leaders together and ''told us that she knew union talk was being talked about on the line and she wanted it to stop or that disciplinary action would be taken.'' According to Jungen, she, Reisdorfer, and Heineminn ''went and told the people what she had said; we told the people that worked under us what she had said, that she did not want union talk being talked on the line.'' Jungen testified that she told ''about 10'' employees this herself; however, Jungen acknowledged she and the other employees continued talking about the Union as they had always done.

Klaus acknowledged telling the three group leader to stop talking about the Union, but denied stating that discipline would be imposed if it was not stopped. Klaus testified that she issued the instruction because another supervisor had reported to her that the three group leaders were talking about the Union rather than working and that it was interfering with production. To the extent that they differ, I credit Jungen. The instruction of Klaus was impermissibly broad, and, coupled with the warning that discipline would be imposed if the instruction was violated, constituted a violation of Section 8(a)(1) as I so find and conclude.

4. Blondell-Bachtell interrogation

The complaint alleges that in December 1980, Blondell interrogated an employee and created the impression of surveillance of union activities. In support of this allegation General Counsel called Lori Bachtell.[6] Bachtell was employed by Respondent in August 1977 and was discharged on May 28, 1981, as discussed infra. She was one of the more active union adherents, engaging in much open and obvious activity. Bachtell testified that in December 1980, at a time when she was working ''in my cell'' (in reference to her cubicle or work area) she was approached by Blondell who asked her ''why did you pick this Union?'' According to Bachtell, Blondell added that the employees had picked a bad union and if it ever came to a vote again the UE would not win and he said, ''besides, we know how many people came to your meetings and there were only 20 or 30 there.'' Bachtell responded that she wished that all she had to do for a paycheck was walk around the plant as Blondell did. Finally, according to Bachtell, Blondell replied that he had been to school many years and had gone to college to get where he was ''and stuff like that.''

5. Abraham-Dickens warnings

The complaint alleges that on various occasions beginning in July 1980 Steve Abraham informed the employees that they could not talk about the Union in work areas at any time. In support of this allegation General Counsel called Carrie Dickens who is an electronics department employee. She was president of the Local from December 1980 to January 1982 and is a union negotiating committee member. Dickens testified that during the summer of 1980 she witnessed Supervisor Abraham's speaking to employees Mary Lou Anderson and Vivian Sagness who were working at the time. According to Dickens, Abraham told Anderson ''that she was not supposed to talk during working hours or in work-designated area even during our breaks.'' Dickens placed this comment by Abraham 2 months before the election which would take it outside the limitations period of Section 10(b) of the Act; therefore, it cannot be made the basis of a violation; however, if credited, it is relevant background. Dickens further testified that during the week of November 4, Abraham called her to his office to warn her about missing work.[7] According to Dickens after Abraham completed the warning:

> He told me that we could not talk union during working hours or in a work designated area even on our breaks

[6] Bachtell was married to Mark Hubert on November 21, 1981, but, for purposes of simplicity, she shall be referred to herein as Bachtell. Blondell denied asking Bachtell why the employees picked the UE and further denied stating that Respondent knew how many employees were at any meetings. To the extent they differ, I credit Blondell. Bachtell had a most unfavorable demeanor. The injection of the gratuitous ''cell'' as her workplace was only part of an evident seething antipathy for Respondent in general, and Blondell in particular. On cross-examination, Bachtell was asked if in February 1981, at a public bowling alley, she did ''flip the finger'' to Blondell, and called him a ''motherfucker'' and a ''cocksucker.'' Bachtell testified that she could not remember. I firmly believe this claimed lack of memory to have been false; even the most profane of individuals would remember such remarks had they been made to a second-level supervisor such as Blondell in a public place such as a bowling alley. In sum, Bachtell was less credible than Blondell. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

[7] The warning about missing work is not alleged to be violative.

> and that if we wanted to discuss union to go up to the cafeteria.

Dickens testified that she responded to Abraham that the employees had a right to ''talk union'' and Abraham replied by stating again that if employees wanted to discuss the Union they had to go to the cafeteria.

Dickens testified that on January 16, 1981, she received another such instruction from Abraham. According to Dickens, on that date, at her 1:50 p.m. break, she used an intraplant telephone to call Steve Virag to ask about some information that the Union had requested. While she was on the telephone about 10 to 15 employees congregated around her work area. After completing her conversation with Virag she used the plant telephone again to page another employee to seek a ride home, but the page was not answered. While she was waiting for the page to be answered, employees Mary Lou Anderson and Cleo Roe came by ''and they were talking to me.'' The subject of their conversation was a transfer that Mark Hubert, then chief steward, had received. She then returned to her work area and ''the 10 to 15 people were still there.'' Those employees asked her what was happening and she explained that she had called Virag and that she had been told by Anderson and Roe about Hubert's being transferred, and that Hubert wanted her to go with him to Virag's office later that afternoon. When the break ended at 2 o'clock, she proceeded to work. After she had worked 5 minutes Abraham approached her and told her to go to his office. When she got there, according to Dickens:

> He told me that I could not hold union meetings on the floor, and I told him that I was not having a meeting, and he said, ''yes, you were. I heard you on the phone,'' and I told him that I had called Mr. Virag for information we had requested, and that I had called Terri Ramynke for a ride home and she never answered; and he told me that we could not have union meetings on the floor, that we could not talk union during working hours in any work designated area even during our breaks and to go up to the cafeteria; and I kept telling him I was not calling a meeting and I did not use the phone for a meeting, and he told me he just wanted me to get this straight, that if I persisted in calling meetings, and talking union on the floor that action would be taken against me.

Employees who wished to eat or have a cup or coffee or smoke during the breaks were required to go to the cafeteria; others were permitted to take their breaks in the work area.

On cross-examination, Dickens testified that the 15 or 20 people started wandering over to her area as soon as the 1:50 p.m. buzzer for breaktime sounded and that there was nothing unusual in this. Dickens acknowledged that several instruments, including hot soldering irons were on the work tables where the employees were taking their break, but denied that Abraham told her that there was no room for a meeting in the area. Although it is not clearly stated in the above quote, on cross-examination Dickens stated that Abraham told her several times that she could not use the telephone for calling meetings, but she repeated to him that she had not done so.

Abraham, who had not been employed by Respondent since November 1982, denied telling any employees that they were required to go to the cafeteria if they wish to talk about the Union. He specifically denied making such statements to Dickens in November and in January, or to other employees 2 months before the election. Abraham testified that in the November meeting he did no more than warn Dickens about her absence problem. He further testified that in the January 21 incident he no more than told Dickens that groups as large as the one that had met with her on the break, which he estimated at between 20 to 25 employees, could not hold meetings in the production area because it was too crowded. Abraham specifically denied accusing Dickens of using the telephone to call a union meeting, and further denied ''warning'' her about anything except absences and holding large meetings in a crowded work area.

I recognize that Abraham was no longer employed by Respondent at the time he testified and had no apparent reason to lie. However, Dickens had a forthright demeanor. Moreover, I am impressed by the fact that Dickens later in the day, as discussed below, complained to Virag that Abraham had accused her of using the plant telephone for calling a union meeting.[8] I do not believe Dickens created the instruction about the telephone out of ''thin air'' and I further do not believe she presented a fabricated complaint of that nature to Virag. This leads me to discredit Abraham about the telephoning instruction, and further causes me to discredit his other denials as well.

Accordingly, I find and conclude that by Abraham's instructing Dickens' not to discuss the Union on the production floor during breaks during November 1980, and on January 16, 1981, Respondent violated Section 8(a)(1) of the Act.

6. Virag-Dickens warning

The complaint alleges that on January 16, 1981, Virag informed employees that they were not to talk about the Union in work areas at any time and threatened to discipline employees who violated that instruction.

According to Dickens, after work on January 16 she, Mark Hubert, Cleo Roe, Mary Lou Anderson, Judy Lawson, and Mark Hassara went to Virag's office to complain about the transfer or assignment Hubert had received.

According Dickens at one point in the confrontation with Virag, she told Virag that ''Steve [Abraham] had accused me of calling union meetings on the floor and using the telephone to call people to a union meeting . . . . I told Virag that Abraham had said that we could not talk union on the floor, during working hours or in a work designated area, even on our breaks; and if we were we were going to have to go to the cafeteria.'' According to Dickens, Virag ''said that was it, that we could not talk union doing working hours or in any work designated area; we had to go to the cafeteria.''

Neither Hubert, Roe, nor Lawson, all of whom testified,[9] support Dickens' testimony that Virag affirmed such an order by Abraham and, on cross-examination, Dickens further acknowledged that Virag could have responded ''I doubt that he said that'' when she related Abraham's instruction to Virag. Virag himself credibly testified that he responded to

[8] Virag did not deny Dickens' complaint; he testified that he could not remember it. When confronted with testimony adverse to Respondent, Virag was diligent to deny it, rather than claim loss of memory, where he apparently could do so with a clear conscience.

[9] Hassara was not called to testify.

Dickens that he did not believe that Abraham would issue such an order. Therefore, I find that General Counsel did not prove that Virag affirmed the instruction given by Abraham. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

7. Abraham-Roe warning

Cleo Roe, a group leader, testified that on the morning following the January 16 Abraham-Dickens incident described above, she was approached by Abraham who told her:

> I want to get the record straight, that I have already talked to Carrie and I am going to tell you that I am not going to discontinue you having—I am not going to stop you from having or taking your breaks in the work area, but there can be no union talk either, during working hours or on break time . . . . [Abraham further said] that it was a violation of the law that disciplinary action would be taken . . . [and] that Carrie had denied talking union but that he was standing close enough and overheard her.

Dickens testified that she repeated this warning to 10 or 12 other employees. Abraham denied making such comments to Roe. However, I found Roe credible on the point and find that by Abraham's instruction to Roe, Respondent again violated Section 8(a)(1) of the Act.

8. Lobby incidents of January 28 and April 8, 1981

The complaint alleges that on January 28 and April 8, 1981, a guard prevented employees from distributing union literature in the lobby of Respondent's facility prior to commencement of the employees' work shift and that on those same dates Virag, by telephone, informed employees that they could not distribute union literature in the lobby during nonworktime and threatened employees with discipline for distribution of union literature.

In support of these allegations General Counsel called Mark Hubert who testified that on the morning of January 28 he arrived at the plant at 6:15 or about 45 minutes before starting time. With him were Bachtell, Roe, and employee Jean Surdez. According to Hubert, the employees distributed union literature for about 15 minutes to employees who were passing through the lobby to enter the production area. Hubert testified that a security guard then approached the employees and told them that he was relaying a direct order from Virag that they could not continue passing out literature in the lobby. Hubert told the guard that he would have to hear that from Virag and the guard replied that Virag was not there. Hubert told guard ''well, let's go up and call Steve.'' Further according to Hubert, when Virag was called at home:

> [Virag] said that we did not have the right to be in there. I said, ''well, it is a non-work area on non-work time, and supervisors in the past have leafleted in there and being that they did it why couldn't we?'' I felt that was discrimination. At that point I believe he said I'm going to call back in 10 seconds and if you are not gone the security guard will take your names and disciplinary action up to and including discharge will be taken.

At that, Hubert returned to the other leafleting employees and reported what Virag said, and they left the lobby. Hubert testified that during the preelection campaign, on one occasion, he saw Supervisors Rose Illman, Jackie Moeller, and Jude Klaus passing out literature opposed to the Union in the lobby area after work.

On cross-examination Hubert acknowledged that the lobby area in the morning is a work area for the guards. There the guards check identification badges, issue temporary badges to employees who have forgotten theirs, and take sick calls to be relayed to supervisors who come in later.

Respondent called Wibbin and Virag to testify about the events of January 28. Wibbin testified that as security supervisor he was present when Hubert and the other employees began passing out literature. Wibbin testified that in addition to checking badges, issuing temporary badges, and taking sick calls to be relayed to supervisors, the guards also look over incoming employees to see if they have any noticeable injury so that none could later complain that they were hurt on the job. (Such employees are sent to the nurse's station.) Wibbin testified that at the time in question there were about 580 employees on the morning shift; about 400 of them usually came in between 6:30 and 6:45, and the remainder between 6:45 and 7 a.m. Wibbin testified that on January 28, as the incoming employees were receiving the literature, they would stop and read it and talk about it. The noise became so great that he had difficulty hearing employees who had called in to report off sick.

Wibbin testified that at one point Hubert and guard Stellenwerf went to the adjacent human resources department office and closed the door. While there Stellenwerf called Virag. Virag testified that he was apprised of the situation and got Hubert on the phone. It was at that point that Virag told Hubert to cease the distribution of literature in the lobby or that discipline would be taken.

On April 8, 1981, essentially the same thing happened. Some employees led by Hubert again began distributing literature in the lobby; and again they were directed by Virag (and the guards) to leave the lobby to do their distributing outside. Again, Virag warned Hubert that his action could be the subject of discipline including discharge.

The complaint further alleges that at the April 8, 1981 bargaining session Diederich said that future distribution of literature in the lobby would result in a 10-day suspension from work. In support of this allegation Hubert testified that during the negotiations, Diederich told the union committee, including Miller, that ''anybody attempting to leaflet in the lobby from day forward would receive an automatic 10-day suspension.''

No other employees testified that they saw supervisors distributing literature in the lobby, either before or after work. It is clear that between the hours of 6:30 and 7 a.m. the lobby was a work area of the guards. They had to check badges, issue temporary badges and take telephone calls from incoming employees as well as check employees who had obvious physical injuries and keep them from going to work before the nurse saw them. Therefore this was clearly a work area, not one subject to distributions by the employees. Therefore, Virag's orders to Hubert on January 28 and April 10, as well as Diederich's statement that discipline would be imposed if repetition did occur, did not violate Section 8(a)(1) of the Act.

9. Warning notices to Hubert, Hassara, and Lawson

a. *Facts*

On April 21, 1981, Judy Lawson organized a group of employees to go to Dolen's office to protest certain working conditions and the lack of progress in negotiations. According to Lawson she talked to some employees on the production floor and others in the lunchroom at her 11:30 a.m. to 12 noon lunchbreak. At approximately 11:50, she and about 15 other employees reached Dolen's office. When she got there she asked Dolen's secretary, Linda Carda, if she could speak with Dolen. Carda replied that he was then on the phone and the employees would have to wait. Lawson testified that she and other employees waited in the doorway until Dolen got off the phone. When he hung up he asked what he could do for the employees and then began a long exchange about what their purpose for coming there was. After this exchange, according to Lawson, ''then we started to move into his office.'' Lawson is generally supported in her testimony by Hubert; however, Hubert acknowledged on cross-examination that ''we went in after he hung up the phone,'' and did not relate any conversation at the door before they entered.

Linda Carda was called by Respondent and testified that when the group arrived at her area she was at her desk. She described the event as follows:

> They didn't stop at my desk to ask to see Mr. Dolen; they just kept walking towards his office. I said, ''Judy, Mike is on the phone right now and you will have to wait.'' She goes, ''Uh-huh'' and just kept walking. So then I go up and went towards Mike's office so that they would not barge in on him while he was on the phone. They just kept walking and I said, ''Judy, you will have to wait while he is on the phone.'' She kept walking and she walked into his office and a couple of others walked in there too. I really had to get back to my desk so I said, ''please wait until he gets off the phone'' and walked back to my desk. Then Mark Hubert said, it's all right, Linda, Mikey would like to talk to us.''

Dolen testified that Lawson, Hubert, Hassara, and Bachtell came into his office while he was still on the phone, and the others waited in the vestibule. He hung up the phone and asked what they wanted.

To the extent they differ, I credit Dolen and Carda over Lawson and Hubert regarding the approach of Dolen by the group of employees led by Hubert, Lawson, and Bachtell. Lawson was not supported by Hubert and was plainly incredible as she described the long exchange between Dolen and herself as she stood outside of Dolen's door after he hung up the telephone and before the group of employees entered the room. Hubert acknowledged stating that it was permissible for them to proceed because ''Mikey'' liked to talk to the employees; however, Hubert incredibly stated that he made this remark to another of the employees in the group rather than to Carda.

At 11:58 a.m., a buzzer warns employees then on lunchbreak that they have 2 minutes to be back at their work station. When that buzzer sounded on April 21, all the employees in Dolen's office left except Hubert, Lawson, and Hassara.[10] These three employees continued talking to Dolen, and Ori (who had entered by that time) until several minutes after noon. Dolen did not ask the employees to leave. The meeting ended when Ori asked Hubert, Lawson, and Hassara if they were not supposed to be at work. At that, the employees left. It is undisputed that the three employees did not return to their work areas until 12:14 p.m.

Supervisor Moeller testified that as the employees in her department began working after the 11:30 a.m.-to-noon lunch period she noticed that Hassara was missing. Shortly thereafter group leader Ray Buchheim reported that Lawson and Hubert were also not present at their work stations. Later in the afternoon Moeller reported to Production Superintendent Ron Johnson[11] that the employees returned late. According to Dolen he was later approached in the afternoon by Ron Johnson. Dolen testified that Johnson asked him if he had approved the employees returning late from lunch. Dolen told him that he was not aware that the employees had returned late from their lunchbreak and certainly had not approved their returning late. Dolen testified that he told Johnson that the employees should receive a warning notice as well as being docked for their time off.

About 15 minutes before the 3:30 p.m. quitting time for the day, Hubert, Lawson, and Hassara were given disciplinary warning notices by their supervisors Moeller and Loxie Johnson.[12] The warning notices are actually letters the texts of which are over 29 lines long; they essentially state that the employees were getting a ''formal written reprimand'' for ''not reporting to your work station and beginning work at the end of your scheduled lunch period'' on April 21 when they arrived at their work station at 12:14 p.m. The letters warned that further such conduct could result in other discipline, including discharge. The letters do not mention anything about the employees' approach to Dolen's office or the employees' treatment of Carda.

At the end of the shift on April 21, Moeller and Johnson went to Dolen's office on their way home. There they met Virag, Dolen, and McCartin.[13] Johnson and Moeller reported to their superiors what had occurred and both related that they were upset by the refusal of the employees to change their timecards. Moeller testified that she asked Dolen if she could issue written warning notices, and Dolen responded that she should get with Virag and write one out. Moeller and Johnson then left Dolen's office.

---

[10] In an arguing of discriminatory treatment, Charging Party's brief states that employees Bachtell and Nord (both of whom testified, but not on this issue) stayed several minutes after the noon buzzer. In doing so, Charging Party relies on the testimony of Lawson who admitted on cross-examination that she relied on statements of Nord and Bachtell made to her after the incident. I do not accept this hearsay and I find that the only employees left in Dolen's office after the noon buzzer were Lawson, Hubert, and Hassara.

[11] Ron Johnson did not testify.

[12] The following references to ''Johnson'' in this section refer to Loxie Johnson, rather than Ron Johnson, unless otherwise specified. When Lawson and Hubert were presented with their warning notices, they were also requested, then told, by their supervisors (Moeller and Johnson, respectively) to correct the timecards they had filled out for the day to reflect that they had returned from their lunchbreak 14 minutes late. Hubert initially complied; Lawson refused and prevailed upon Hubert to change his card back to the way he had originally filled it out, claiming 8 hours work for the day. (Apparently Hassara complied with any request to change his timecard because nothing further was said of him by either party.) Neither Hubert nor Lawson gave Johnson or Moeller reason for their refusals to correct their timecards (and none was suggested at trial.)

[13] McCartin testified, but not about this topic.

Virag, Dolen, and McCartin discussed the matter after Moeller and Johnson left. Dolen testified about the discussion:

> Primarily, it was my talking to Steve Virag about the incident that happened at the lunch period, with the disregarding of my secretary, and the people coming into my office. And we also reviewed the failure of the employees to sign their timecards. Based upon the information that we had available at that time, we decided with basically my decision that a second warning should be issued to these two employees.

However, Virag testified:

> We discussed to the point of what shall we do. We felt that there should be some action taken, but the decision wasn't made at that point as to what that action should be.

Virag then skipped in his testimony to a point in time (the next morning) at which he was working with Carda to compose warning notices to Hubert and Lawson; he did not testify as to when a decision to issue those warning notices were made if not at the meeting previously described.

Virag testified that on the morning of April 22, as he and Carda were working together, he learned for the first time, from Carda, about how the employees had walked by her in defiance of her statement that they should wait for Dolen to finish his telephone conversation before entering Dolen's office. Virag first testified without qualification that on April 22 he did not ask Dolen about the events in the office at noon on April 21; but when pressed, he testified that he could not recall discussing the event with Dolen before he drafted the warning notices to Hubert and Lawson.

On that day, April 22, the second notices were issued to Lawson and Hubert stating that they were receiving a written reprimand for:

> 1. Your unacceptable and improper conduct in disregarding the instruction of the Director's secretary for you to wait until he could see you.
>
> 2. Knowingly and willfully making a false entry on your daily timecard at the end of the shift on 4-21-81, claiming pay for time not worked.

Following the two numbered paragraphs, Virag follows with a five-paragraph statement of the events on April 21, stating, inter alia:

> Your actions in refusing to accurately fill out your timecard, and knowingly and willfully refusing to correct your timecard when requested to do so, amounts to a falsification of Company documents and insubordinate action on your part towards supervision.

Dolen testified that he approved of these reprimands drafted by Virag; however, when I asked Virag if Dolen approved the reprimands, Virag replied ''No. Not to my recollection, he did not.'' Dolen was asked on cross-examination why Hassara and Bachtell were not giving warning notices for ''disregarding'' Carda as were Lawson and Hubert. Dolen replied:

> Primarily the reason is that [Judy Lawson] and Mark Hubert were the two who barged into my office first passed my secretary. The rest of them just followed as well as whoever was standing around outside my doorway, who I do not even know who that was. And that combined with the fact that they refused to change their timecards when so directly ordered by their supervisors.

Lawson testified that twice during the autumn of 1980 she met with Virag in his office and the meetings continued into working time. Lawson testified that one of these times she was docked for not being at the work station and the other time she was not. Dolen testified that if employees had scheduled meetings with himself or Virag, the employee would not be docked or disciplined for time not worked.

Virag described Respondent's policy regarding employees meetings with the managers as:

> I think it was an understanding that we had communicated to the supervisory work force that anybody that requested a meeting with somebody other than their supervisor would have to go through their supervisor, make a prior appointment, and get mutual agreement to a time period.

There is no evidence that employees had in the past approached any of the managers on breaktime, then stayed in the office through the beginning of worktime.

b. *Conclusions*

The complaint alleges that the warning letters issued to Lawson, Hubert, and Hassara on April 21 and the warnings letters issued to Lawson and Hubert on April 22 were discriminatorily motivated, and that by their issuance Respondent violated Section 8(a)(3) and (1) of the Act.

When the 11:58 a.m. and 12 p.m. buzzers sounded, everyone in Dolen's office, including Dolen, knew that one lunch period was ending and another beginning. When the other employees, including Bachtell, left at the warning buzzer, Dolen did not ask the remaining three why they were not leaving also or if they had permission from their supervisors to stay later. He continued talking to the employees for several minutes, assuredly aware that they were overstaying their lunch period. Dolen continued the conversation with them regarding their terms and conditions of employment, and negotiations about those terms and conditions of employment, without the slightest warning that their staying was impermissible in his view. Since they were talking to the chief official in the plant, the employees had no reason to believe that they were engaged in prohibited conduct. Therefore, Dolen allowed Lawson, Hubert, and Hassara to continue with their presentations of grievances, and statements in support of the Union and its negotiating effort, and then penalized them for it by ordering Ron Johnson to cause the April 21 warning notices to be issued. This was a ''setup'' in the classic sense and was plainly a violation of Section 8(a)(3) and (1) of the Act, as I so find and conclude.

Additionally, I would note that the employees have a right under Section 7 to leave their places of work, during working time, to protest terms and conditions of employment, even when there is a valid rule against leaving work without permission. Here, when the noon buzzer sounded, worktime

had started and the employees were in the status of strikers; they were withholding their labor in protest over the progress at negotiations as well as complaining, or grieving, over certain terms and conditions of employment (such as the recently installed buzzer system.) To discipline them for such conduct violates Section 8(a)(1) of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962).

However, the employees had no right to be paid while talking to Dolen. Specifically, Lawson knew that at least once when she had overstayed a break in a manager's office she was docked. The refusal of Lawson and Hubert to change their timecards to reflect the amount of time worked that day was therefore not activity protected by the Act. Accordingly, I find and conclude that by the issuance of the warning notices of April 22 to Hubert and Lawson, as the notices pertained to their refusals to correct their timecards, did not violate Section 8(a)(1) or (3) of the Act.

However, the warning notices of April 22, to the extent they refer to the employees' treatment of Carda, stand on a different footing. Respondent's explanation for this portion of the April 22 warning notices is replete with confusion, contradictions, and forgetfulness.

According to Dolen's testimony, the first suggestion of discipline of any employees was in midafternoon of April 21 when Ron Johnson told him that Rassara, Hubert, and Lawson had returned late from lunch. Dolen did not testify that he was even thinking of disciplining any of the four (including Bachtell) employees for ''disregarding'' Carda before he raised the matter with Virag and McCartin late in the afternoon after Loxie Johnson and Moeller left his office. But Virag flatly contradicted Dolen when the former testified that his first knowledge of the employees' ''disregarding'' of Carda was on the morning of April 22 when he was preparing warning notices for Hubert and Lawson. If that was the case, and I believe that it was, then the ''disregarding'' was not even mentioned when Virag, Dolen, and McCartin supposedly discussed the action after Johnson and Moeller left Dolen's office on April 21, and Dolen's testimony to the contrary is false. That is, Dolen did not decide the ''disregarding'' was worthy of discipline until some time on April 22. He condoned the action and nothing was done until Carda told Virag about it. Virag was asked if he consulted with Dolen about the substance of the warning notices of April 22. He first denied it; then a loss of memory came in to play.

Virag claimed a loss of memory for what was said in his meeting with Dolen and McCartin on the afternoon of April 21; then he forgot if he talked about the matter with Dolen on April 22 after hearing from Carda, or what was said if he did. I firmly believe that these claims of lapses in memory are false. Hubert was the local union president; Lawson was the most vocal of the employees on the Union's negotiating committee, and Virag was present for nearly all meetings; Lawson and Bachtell were discharged on May 28 after Virag suspended then on May 6, and these discharges were the topic of unemployment compensation hearings as well as a major topic in this case. That is to say, discipline of Hubert and Lawson was not a trivial matter. Virag is a personnel director; memory of facts surrounding the imposition of discipline, especially discipline of the Union's most active employee advocates, is necessarily a primary responsibility of his. Memory of the discipline, and especially how the decision to discipline was made, had to have been playing over and over in Virag's mind from April 21, 1981, to the date of the hearing. Certainly, Virag would not have issued a warning notice over an incident directly involving Dolen without consulting Dolen. I believe that after Virag heard from Carda on April 22 of how the employees ''disregarded'' her, he went to Dolen and suggested that conduct as an additional ground of discipline for the union leaders, Hubert and Lawson. The refuge of ''I don't remember'' consultations with Dolen on April 22 had to be invoked by Virag because he has come to learn that discipline as an afterthought, or after condonation, is treated in law as pretextual.

I do find the stated basis for the ''disregarding'' portions of the April 22 warning notices to be pretextual; I find it was because of the status of Hubert as union president and Lawson as chief union negotiating committee member; it was also retribution for their presentation of grievances and complaints about the progress of negotiations. Accordingly, I conclude that the issuance of this portion of the April 22 warning notice was discriminatorily[14] motivated and a violation of Section 8(a)(3) and (1) of the Act.

10. Blondell-Raiser-Bachtell threat

The complaint alleges that about May 1, 1981 ''in the presence of employees in the cafeteria of Respondent's facility, [Blondell] instructed a supervisor to closely examine Respondent's attendance records relating to employee Lori Bachtell because of Bachtell's activities on behalf of the Union.''

Bachtell testified that at a production meeting (later established to be on April 30, 1981) conducted by Blondell, she asked some questions after Blondell had finished a presentation about production. Bachtell testified that she asked Blondell when a then-dormant production line would be started and if there would ever be other production lines established in addition to the ones then existing and the one that Blondell had announced in his presentation.

Former employee Jan Kaiser testified that she was in attendance at that meeting which occurred just before afternoon break. At the break she sat in the cafeteria with employees Renae VanDerloo, Carol Garry, and Rose Baldwin. Also present were Margaret Pekoske and Lynette Anderson, production area supervisors. According to Kaiser, Blondell got a cup of coffee and sat down and started talking to Pekoske about Bachtell. He told Pekoske ''to pull all of Lori's records and find out how many days that she had missed, been late or left early, because he wanted to fire her.'' When asked by General Counsel if Blondell stated why he wanted to fire her, Kaiser replied, ''because he said she was getting too smart and reporting all this back to the Union.'' Kaiser further testified that after the break she told Bachtell ''that [Blondell] had told [Pekoske] to pull her records and check on how many days she has been tardy, late, and left early, because he wanted to fire her.'' Bachtell

[14] Bachtell and Hassara, who were less active union proponents, received no discipline for essentially the same conduct. Since I do not believe Dolen's testimony that in the afternoon on April 21 he, Virag and McCartin decided that there should be some discipline over the Carda ''disregarding,'' I necessarily do not believe his testimony that the managers decided that Hubert and Lawson should have been disciplined, and Bachtell and Hassara not, because the former pair first walked around Carda into his office.

testified that she received a report from Raiser that Blondell said he would ''get'' Bachtell, while Raiser testified that she told Bachtell that Blondell wanted to ''fire'' her.

Blondell, Anderson, and Pekoske were called by Respondent. Each of these supervisors testified that Blondell made no remarks regarding Bachtell's records and did not express a wish to fire Bachtell. The supervisors testified that Blondell approached the lunch table but did not sit down. He asked the two supervisors how they thought the production meeting had gone. Blondell and Anderson testified that at that time Blondell first told Pekoske to tell Bachtell not to go to the office to speak to Mike Dolen without an appointment. Then, reconsidering, Blondell told Anderson to do it as she was the ''lead'' supervisor. Pekoske testified that Blondell stopped by the cafeteria and spoke to herself and Anderson about the immediately preceding production meeting. Pekoske further testified that Blondell first told her, then Anderson, to tell Bachtell not to go to Dolen's office without an appointment, but Pekoske could not remember whether Blondell made the instruction to be relayed to Bachtell in the cafeteria or in the production area after the break. However, Pekoske, as well as Blondell and Anderson, denied that Blondell told either herself or Anderson to collect Bachtell's timecards because he wanted to punish Bachtell for reporting to the Union.

While Pekoske could not remember where the three supervisors were (in the cafeteria or on the production floor) when Blondell told her, then Anderson, to relay an instruction to Bachtell, I do not find this factor to constitute a flaw which would prevent crediting the three supervisors. There is more of an inconsistency between Bachtell and Kaiser; if Blondell had said ''fire'' (rather than ''get'') Bachtell, Raiser would assuredly have repeated it to Bachtell, and Bachtell would assuredly have included it in her testimony.

When a supervisor conducts a meeting of employees to announce production plans, or anything else, it would be foolish, to the point of being unrealistic, not to think that anything and everything said would get back to the Union. This is especially true when such strong union adherents as Bachtell are in attendance. Furthermore, there is no suggestion of why the particular questions asked by Bachtell would have irritated Blondell. In sum, it is unlikely that the event occurred as related by Kaiser. Raiser appeared to believe what she was testifying to; however, there were at least three persons between her and Blondell at the table in the crowded cafeteria. Perhaps in the din of cafeteria conversations, Kaiser misheard what Blondell said to Anderson and Pekoske; I need not speculate. I find the denials of Blondell, Anderson, and Pekoke to be credible, and I shall recommend dismissal of this allegation of the complaint.

11. Suspensions and discharges of Lawson, Bachtell, and Sterud

a. *Facts*

On May 5, Lawson talked to several employees suggesting that they approach Dolen after working hours to protest the warning notices that she, Hassara, and Hubert had received and further protest the lack of progress of negotiations. On May 6, at her lunchbreak, she enlisted other employees to go to Dolen's office to register such protest. At quitting time, 3:30 p.m., Hubert led a group of about 40 employees to the office area of Dolen. As well as Lawson, this group included Bachtell and Bernie Sterud. Hubert confronted Carda demanding to see Dolen. Carda responded that Dolen was busy and asked if they had an appointment. The employees acknowledged that they did not and Carda replied that they would have to set up an appointment through their supervisor to meet with Dolen individually. Then there was a chorus of comments from the group, principally led by Hubert, that they had a right to meet with Dolen under the National Labor Relations Act.

Dolen testified that he was in his office with Virag and Daryl Roetzel, plant comptroller, working on a budget. Dolen testified that there ''seemed to be fair amount of commotion'' or noise coming from the reception area which interfered with the men's consideration of the budget.[15] Dolen went to the door of his office and was met with demands from several employees to come in to meet with him, because ''I was the person who was making the decisions, and that I was the one that they had to come to talk to get any results from. They were unsatisfied in what was going on in negotiations.'' Dolen first addressed Carda stating she did not had to put up with abuse from the employees. Then to the group he stated:

> I am in a meeting. I am not going to meet with you now. If you want to talk to me, you can individually arrange appointments through your supervisors, and I will be glad to talk to you . . . however I am busy now. I will not talk to you.

Then Dolen returned to Virag and Roetzel and attempted to continue working on the budget. Dolen testified that the ''noise'' continued for about 15 minutes before he ordered Virag to go out and get it stopped.[16] After ordering Virag to get rid of the employees, Dolen called Ori to come to his office for his portion of the budget meeting.

When Virag got into the reception area there were no employees there. Just beyond the reception area, leaning against a railing of a stairway to the plant, were Sterud, Bachtell, and Lawson. (The other employees had gone toward Ori's office, a fact of which Dolen was apparently aware for it was at that point that he called Ori on the intercom and ordered Ori to his office.)

According to the credible testimony of Virag:[17]

> I walked out of [Dolen's] office, and as I was walking in this direction, Judy Lawson said, ''Why won't you guys meet with us?'' And she said, ''We'll wait until you will meet with us.''
>
> And I said, ''We are going to be busy and we are just not going to be able to have the time to meet with you tonight.''
>
> And she said, ''We'll wait all night, if necessary.''

[15] No employee was disciplined for the amount of noise made; however, I am constrained to point out that I do not believe that the 40 employees gathered in the reception area made no noise as Lawson repeatedly, and gratuitously, insisted upon while on direct examination.

[16] I do not believe that Dolen suffered the noise to continue before 15 additional minutes before he ordered Virag to get it stopped; however, I consider this a harmless exaggeration as, again, no employee was disciplined for what happened in the reception area.

[17] The contrast between Virag's clear and convincing recitation of the events of May 6 and his vagueness and forgetfulness of the events on April 21 and 22 is remarkable. It was even more striking in person than it is in print.

> And I said, ''We are not going to be able to meet with you tonight.''
>
> And she said, ''We're not going to leave.''
>
> And I said, ''Well,'' I said, ''I'm going to have to give you a direct order then to leave the office area and the plant. And if you don't you will face disciplinary action.'' I said, ''Now, what are you going to do?''
>
> She said, ''We're not going to leave.''
>
> And I said, ''Well, let me repeat it, one more time . . . so that there is no misunderstanding; and I am going to give you a direct order to leave the office area and the building.''
>
> And they said—they didn't say anything after my second direct order; they just stood there. They were leaning against the railing. And I waited, and there was no response on their part, and at that point, I said, ''Okay, you are suspended. Leave the building.''
>
> And I had the guard escort them out of the plant.
>
> I told them not to report to work tomorrow—''you are suspended; don't report to work tomorrow.''

Virag followed the other employees down to Ori's office where he told Ori that Dolen was waiting for him. Virag ''told the people in the office that they would have to leave the building, leave the office area and the building.'' Some employees said they had some questions: Virag asked what questions. One employee said they wanted to arrange a meeting with Blondell, and Virag replied that he would arrange it then added, ''I am going to give you a direct order to leave the office area [and the plant].'' At that point the remaining employees left and none other was disciplined.

While Virag testified that he ordered the employees twice to leave, Bachtell, Lawson, and Hubert testified that there was only one such order. However, in a written statement to the South Dakota Unemployment Commission Sterud acknowledged that there were ''2 or 3'' orders by Virag to leave and I find that, based upon Sterud's admission,[18] as well as Virag's credible testimony, that two orders were given. There was a pause between the second order and the statement by Virag that the employees were suspended. While it is not possible to estimate the length of this pause with precision, based upon the way Virag related the event, I find that was long enough for the employees to contemplate the gravity of their actions.[19]

On May 28, 1981, by letter of that date, Lawson, Bachtell and Sterud received the following notice:

> This letter is to advise you that after a thorough investigation, following your disciplinary suspension, the decision of the company is that you be discharged for your insubordinate action.

Between the suspension and the discharge the Respondent solicited and received written explanations from the employees about their conduct. Also at negotiation sessions, Respondent entertained arguments from the Union against the suspensions and the then-contemplated discharges.

b. *Conclusions*

Respondent's plant is private property, and the employees were licensed to be on it only for the hours they were scheduled to be at work. However, a refusal to leave a plant by nonworking employees can be activity protected by the Act if the employees are attempting to present grievance.[20] As cases cited by Charging Party hold, such activity is protected when refusals to leave a work area is spontaneous in origin, brief in duration, and occur in a context devoid of an established grievance mechanism which the employees could invoke to present their grievances. In addition to the fact that the refusals to leave occurred immediately outside Dolen's office, a floor away from the employees' work area, there are other differences in this case and those relied on by Charging Party.

The activity was not spontaneous. On May 5 Lawson began recruiting employees to approach Dolen's office outside working hours. At the lunch period on May 6, the specific plan to go to Dolen's office that day was formulated. Therefore, the activity was contemplated for at least 30 hours and cannot be considered ''spontaneous'' in any sense of the word.[21]

The refusal of Lawson, Bachtell and Sterud was brief, but only because Virag suspended them. Lawson told Virag unequivocally that the three were going to stay at Dolen's door ''all night, if necessary'' and that they were ''not going to leave.'' Virag had no reason to believe that Lawson was not serious. Had he not acted, Respondent would have been required to post guards around the three employees (to the neglect of other plant areas) or abandon the office area to them, at least overnight. This the Respondent was not required to do.

There was a mechanism to present grievances. While there was not step-by-step, formalized grievance procedure, grievances of the Union were regularly entertained by management. Grievances, including specifically grievances concerning discipline and discharges of employees and lack of progress in negotiations,[22] were raised and discussed regularly during the course of negotiations which included 53 sessions over a 1-1/2-year period.[23] These grievances were presented by Miller who had been a professional organizer and contract administrator for years. He was always assisted by plant employees, most notably Lawson. Virag, Respondent's chief personnel officer was present at all bargaining

[18] See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

[19] Additionally, while Virag did not mention it, Bachtell acknowledged that after Virag's order, which she described as his first and only order to leave, she argued with him. According to Bachtell:

> I told him we had a right by law to be there and then he said, ''you do not own the place,'' and I said, ''of all the years I have worked here and the thousands of dollars you have ripped me off in wages, I think I own a little bit of it.''

This exchange, alone, proves that, after receiving a categorical order to leave, the employees stayed around long enough to contemplate their actions.

[20] Such activity is decidedly not protected if the employees use violence or prevent other employees from working. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). There is nothing of that sort involved herein.

[21] Indeed, Lawson acknowledged on cross-examination that she had consulted with officials at the union office before May 6, 1981, about the possibility of employees approaching Dolen as a group. She further acknowledged that ''[t]hey might have said it was a good idea.''

[22] Not only the negotiators for the Union, but the Union's attorney appeared at the negotiations and complained of lack of progress.

[23] In addition to continual protests about Respondent's bargaining techniques, Miller presented numerous grievances at the bargaining sessions before the suspensions. The numbers of the sessions and topics of the grievances are: (1) discipline of several employees; (6) Lawson's transfer; (7) union literature being picked up in the cafeteria; (17) selections for a layoff; (19), ejection of handbilling employees from the lobby; and (24) termination of probationary employees who had been laid off.

sessions. Therefore, the employees' grievances were entertained at the highest level of union-management representation. In summary, while the procedure for raising and disposing of grievances was not embodied in a written agreement, it nevertheless existed and was available to the employees on May 5 and 6.

Therefore, this case is not one of employees groping for a method to express themselves and getting carried away by a fleeting impulse. They were in constant contact with, and advised by, professionals in the labor relations field. They deliberated, and then they consciously assumed the risk of discipline for their actions. They were presenting grievances of precisely the same nature as those which were being pressed by the Charging Party during negotiations. They announced that they would stay ''all night,'' and did not move until they were suspended. This was not activity protected by the Act; it was insubordination in its purest form, and Lawson, Bachtell, and Sterud were discharged for that reason alone. Therefore, by the suspensions of May 6 and the discharges of May 28, 1981, Respondent did not violate Section 8(a)(3) or (l) of the Act, as I so find and conclude.

D. *The 8(a)(5) Allegations*

1. The bargaining sessions

a. *Contentions*

The complaint alleges that after certification of the Union, Respondent negotiated without intent to reach an agreement, in violation of Section 8(a)(5). More specifically, the complaint in Case 18–CA–7065 alleges at paragraph 11:

> (d) During the months of October 1980 through March 1981, Respondent bargained without a real intention of reaching agreement with the Union by engaging in bargaining tactics designed to extend bargaining unnecessarily; delaying the furnishing of employee seniority information to the Union which was relevant and necessary for purposes of collective bargaining; providing conflicting and inaccurate wage information to the Union; making contract proposals which were predictably unacceptable to the Union; making contract proposals which would give Respondent uncontestable control over terms and conditions of employment including revisions of work rules and job tasks.

The complaint in Case 18–CA–7402 alleges at paragraph 13:

> (a) Since April, 1991, and continuing to date, Respondent, by its negotiating committee, during contract negotiations, has made proposals in such areas as management rights, scope of agreement, seniority, hours of work, overtime, wages, discipline and discharge, and grievance and arbitration, which would give Respondent sole and uncontestable control over the terms and conditions of employment of employees in the [production and maintenance unit.]
>
> (b) Since April 1981, and continuing to date, Respondent, by its negotiating committee, during contract negotiations, has made proposals in such areas as top wage rates, night shift premium, group leader premium, sick leave, overtime, layoff, and delayed benefit coverage, which regressed from current and established policies and practices.
>
> (c) Since April 1981, and continuing to date, Respondent, by its negotiating committee, during contract negotiations, has proposed that employees would enjoy preferential recall rights following an economic strike only for a period equal to their period of employment, but in no event to exceed 12 months.

Additionally, the complaints allege that Respondent refused to submit various pieces of information necessary to the Union for the purposes of collective bargaining and further took certain unilateral actions in violation of Section 8(a)(5) of the Act. The issues regarding the alleged refusals-to-furnish information and unilateral actions will be discussed in subsequent sections of this decision.

At the close of the hearing counsel for General Counsel amplified his contentions in argument. The contentions stated therein and/or in General Counsel's brief are: Respondent proposed clauses on productivity, management-rights disciplinary procedure, grievance, and arbitration, and a ''zipper'' clause which, taken together, no self-respecting union could accept. General Counsel argues that other positions of Respondent constitute either indicia of bad faith or per se[24]+ violations, to wit: Insistence on review by the courts of appeal of any Board unit placement decision on newly created jobs; insisting that employees lose seniority after 12 months of layoff or on medical leave; refusing to continue its past practice of layoffs by volunteers first rather than by seniority; insisting on the unilateral right to select employees for layoffs and or recalls which are for periods of less than 2 weeks; insisting on using certain ''merit'' factors before seniority in selecting employees for longer layoffs; insisting on the right to change hours of work without bargaining; engaging in unilateral action such as institution of a buzzer system for regulating break and lunches and insisting on including reference to it in a contract; insisting that overtime compulsory; insisting on the right to require employees to take 1 week of vacation during Respondent's annual summertime shutdown; refusing to grant wage increases for no reason other than that Respondent could hire all the employees it needed at the rates of pay it offered; insisting on reducing the previously existing 5-percent night-shift premium to a cents-per-hour basis; insisting on reducing group leader pay premium; insisting on requiring employee contribution to insurance policies which had previously been at no cost for employee-only coverage; insisting upon elimination of Respondent's previously existing sick day program; insisting that probationary employees not receive holiday benefits; insisting upon a new absence policy which was a reduction of a benefit previously enjoyed by the employees; refusing to agree to compulsory arbitration; insisting upon negotiating limits of authority of an arbitrator although arbitration would be voluntary; insisting on the right to lock out employees in the event the Respondent had a grievance which it considered unsatisfied; insistence on an ''overly-broad'' management rights proposal; insisting on a clause which would cause any party to waive its rights under the contract or law upon the demand of the other party; insisting that recognition

[24] Throughout General Counsel's (and part of Charging Party's) closing statement at transcript pp. 12,416 through 12,456, ''per se'' is typed pro se and the record is, of course, corrected.

be limited to Respondent's current address in Sioux Falls; and refusing to bargain on the issue of checkoff.

In his closing statement and/or brief submitted subsequent to the hearing, counsel for the Charging Party adopts General Counsel's contentions and further argues that Respondent bargained in bad faith by misrepresenting its past practice in regard to the length of probationary period; by insisting upon provisions which would divest employees of their seniority rights unreasonably; by insisting on the unilateral right to select employees for new shifts; by insisting on the unilateral right to assign seniority preferences among employees hired on the same day;[25] and by ''belatedly'' insisting on the right to require employees to take part of their vacation during inventory shutdown. The Charging Party in its brief further argues that Respondent refused to bargain in good faith about the subject of grievance procedure by: unreasonably insisting upon limiting the number of employees that could be present at various stages of any grievance procedure; insisting that contract sections be identified on the face of a grievance when filed; refusing to agree to monthly third-step meetings; refusing to agree to allow investigation or processing of grievances during working time; insisting on unreasonable time limits on the movement of grievances between steps; insisting on negotiating limitations of arbitrators' powers and detailing elements of the arbitration process, then withdrawing from an agreement that there would be compulsory arbitration. After that, continues Charging Party, the Company insisted upon unreasonable limits upon the Union's right to strike over unresolved grievances and further insisted on the unlimited right to lock out employees.

The Union further argues that evidence of bad faith is found in Respondent's conduct on several other topics: the tactics it engaged in to deny visits by the union representatives; its refusal to recognize, as an agent of the International, Local 1108, which was established for the employees represented by International; attempting to bargain in conflict with the certification by refusing to include certain jobs specified in the Board certification; refusing to bargain on the topics of hours of work, holidays, leaves of absence, provisions for a union bulletin board, and duration of the contract; insistence upon union agreement to the elimination of sick days; and exclusion of probationary employees from medical insurance and holiday benefits.

Respondent denies that it has refused to bargain in good faith and further alleges that no order can issue against it because the Union has bargained in bad faith by the following conduct: insisting that Respondent recognize Local 1180 as a representative of the employees even though it was not certified by the Board; refusing to bargain with respect to work rules; repudiation of prior agreements; insisting on superseniority for all officers and stewards of the Local; insisting on a union-security clause in the ''right to work'' State of South Dakota; proposing and insisting upon the designation of a floating holiday by union members only; and misrepresenting to employees Respondent's positions in bargaining.

[25] Although this issue may appear trivial, Respondent many times hired as many as 100 employees a day, and the matter was of great importance to the parties.

b. *Facts*

There were 53 bargaining sessions conducted between October 7, 1980, and February 19, 1982.[26] In none of these sessions did the Union suggest that the employees might go on strike, nor did the employees strike.

Diederich attended all meetings for Respondent; Miller missed two early meetings (November 18 and 19, 1980) and five later ones (September 1 and 2 and November 10, 1981; January 21 and February 11, 1982). In addition to various employee committee members, Miller was usually accompanied by at least one other professional union representative including Dennis Painter, Carol Lambiase, or Kathy Laskowitz. Diederich was always assisted by Virag, and usually by Ori and McCartin.

The credibility conflicts are virtually innumerable. Only Miller, who missed seven sessions, was called by General Counsel and Charging Party to give plenary testimony about the bargaining sessions. Diederich gave plenary testimony for Respondent. While Ori and Virag were called to corroborate Diederich in the many areas of credibility conflicts, no one was called by General Counsel or the Charging Party to corroborate Miller.

Miller and Diederich took notes. Lambiase attended all meetings between January 21, 1981 (the 17th session) and the end of negotiations and took notes. Miller did most of the talking for the Union, and Lambiase's notes are far more complete than Miller's for the sessions at which both she and Miller were present. Painter was present at many of the bargaining sessions and substituted for Miller on November 18 and 19, 1980. Laskowitz attended several earlier meetings with Miller and replaced Miller as chief union spokesman in four of the five later sessions Miller missed. Of course, the notes of Miller, Lambiase, and Diederich were made available for purposes of cross-examination. The notes were not physically placed in evidence; however, especially in Miller's cross-examination, they were quoted extensively into the record. While Diederich was on cross-examination, counsel for General Counsel and the Charging Party were able to demonstrate essentially no conflicts between his direct examination and his notes. However, Miller was contradicted many times by his and Lambiase's notes. Also, many times, Miller's or Lambiase's notes have no mention of occurrences or exchanges described by Miller on direct examination. While I realize that some omissions from notes are not particularly meaningful, some are. Miller's testimony was further contradicted several times by his own pretrial affidavits.

The contradictions and omissions in Miller's testimony (as detailed herein), and the total failure of corroboration of his testimony, have accordingly caused me generally to credit Diederich over Miller regarding the bargaining table exchange. Therefore, the following narrative, unless otherwise indicated, rests on undisputed facts or the testimony of Diederich.[27]

[26] The complaint does not allege dilatory tactics on the part of Respondent; therefore, evidence of how meetings were arranged was not received.

[27] I have not expressly resolved all credibility conflicts between Miller and Diederich. I include only those conflicts which I deem controlling and those which I feel should be included for possible purposes of review.

Bargaining Session No. l; October 7, 1980

In attendance for Respondent were Diederich, Virag, Ori, and McCartin. Present for the Union were Miller, Painter, and employee negotiating committee members Chuck Eisenhauer, Silvia Dunkelburger, Mark Hubert, and Judy Lawson. After a discussion of dates and places of future bargaining meetings and a brief discussion of discipline of a few employees not involved in this case, Miller's first proposal was that Respondent pay the members of the bargaining committee for time spent at negotiation sessions. Diederich replied that the Company was ''not proposing to do that.'' This was a response frequently employed by Diederich in lieu of a simple ''no.''

Diederich told Miller that Respondent had received notice of an increase of $66,000 in the additional annual premium for employees' group health insurance; that in the past the employer had paid 76 percent of prior increases for family coverage[28] while the employee paid 24; that worked out to a $9-a-month increase per employee which Respondent was proposing to pass on to employees. Miller responded that he had a proposal on group health insurance in the Union's package and would state it later in the meeting. Miller asked if Dunkelburger and three other employees could be excused from Saturday overtime in some of the upcoming weeks so that they could attend union district meetings in Minneapolis; Diederich replied that he would have to check with the supervisors and get back to him. Miller stated that he wanted the Company to recognize the stewards whom the Union had appointed and to agree to meet in regularly monthly meetings to discuss grievances. Diederich replied that it would be better to negotiate something in the contract regarding a formal procedure for handling grievances. Diederich asked what the extent of the union representatives' authority was, and Miller replied that contracts had to be approved by membership vote; Diederich responded that his committee had authority to negotiate ''but there may be times when something will come up that we will have to go back to Mike Dolen on.'' Diederich asked Miller what he had planned for the remainder of the session; Miller replied that he had some ''general statement of principles,'' although it was not specific contract language.

Then Miller introduced a list entitled ''Contract Proposals.'' These items listed were ''proposals'' in the broad sense of the word; they were actually only generalized statements of union objectives. In presenting the document Miller told Diederich that the Union was attempting to secure the wages and benefits received by the employees at Respondent's plant in Minneapolis. Miller said that the employees should get an increase of 85 cents per hour immediately, and that the parties should negotiate a wage progression schedule which should bring the wages to the same level as that in Minneapolis by the end of the contract term. Diederich did not reply. Following that, Miller essentially read the 29 items listed in the document. There were only brief exchanges about the proposals and it would serve no purpose to quote all of the proposals or the exchanges at this point. Two exceptions are in the areas of insurance and plant tour.

Prior to certification of the Union, Respondent had paid all the cost for employee-only coverage of its health and dental insurance plans. It paid health insurance premiums for dependent coverage in a 76/24 ratio and 80/20 for dependent dental coverage. The Union's health insurance proposal was that the Company pay all the cost for dependents, as well as for employees. Miller read this section and did not respond to Diederich's statement that the Company proposed to pass along the increased premium for dependent health coverage.

Another proposal, discussed on October 7 was that union representatives ''shall have access to the plant for union business.'' Diederich testified that after Miller read the item Miller ''said at some time when it is convenient he would like to come through the plant with Dennis Painter and chief steward and the president [of the Local].'' Diederich did not respond. When asked on direct examination why he did not respond, Diederich replied:

> I did consider the request, and it is hard to capture the inflection in voices, but it was akin to afterthought or an off-the-cuff—it is like when you run into an old high school buddy and you say, we have got to get together sometime and have a drink, but you don't do it.

On cross-examination, Diederich insisted that ''it wasn't something that I interpreted as a request, and I didn't respond to it.'' When asked if there was any question in his mind that Miller then wanted a tour of the plant as of that time, Diederich replied, ''No. There was no question in my mind that somewhere along the line he wanted to come through the plant. That's what I understood.''

Miller testified that in an initial phase of the October 7 meeting, and not a part of the discussion of Item 24 when he got to it in reading his October 7 proposal, ''I requested . . . Mr. Diederich the opportunity to tour the plant, to study the jobs, to prepare myself for negotiations. Mr. Diederich said that he would get back to me on that.'' Diederich's testimony on the tour-request issue was fully supported by Ori and Virag and Diederich's notes. On the other hand there is no mention of a request in the notes of Miller. In a summary prepared before trial for the purposes of preparing Miller's testimony, the word ''request'' was injected as an apparent afterthought before the word ''tour'' of the plant was stated. To me this demonstrates that Miller was being prompted to insert a recitation of a clear request in his testimony. Accordingly, I credit the testimony of Diederich that the matter was brought up only in relation to the 24th item of the October 7 proposal, and I specifically discredit Miller's testimony that he said he wanted to take the tour to prepare for negotiations.

Bargaining Session No. 2; October 15, 1980

The meeting took a format of Diederich, Virag, and Ori asking questions about what the Union meant by each item of the October 7 proposal.[29] When Miller or another committee representative gave the Union's response, the company members said nothing to indicate whether they would agree

[28] Employee-only health insurance was completely paid by Respondent.

[29] On direct examination Miller testified that ''first of all'' he asked Diederich if he had checked on the possibility of the Union's making a tour of the plant to see different jobs, and Diederich replied that it was ''not necessary.'' On cross-examination, Miller retreated from his statement that a tour was the first thing discussed, stating that ''it was one of a number of subjects'' that were discussed early in the meeting. Diederich, who was fully supported by Ori, testified that the tour was mentioned only in connection with the discussion of bulletin boards, as discussed below. I credit Diederich and Ori over Miller.

with what the union representatives expressed. After hearing the answer, Diederich would usually respond only with another question on the same article or ask What Miller meant by the following article of the October 7 proposal. General Counsel contended at trial that the number of questions asked in the earlier sessions constitute evidence of bad faith either because the answers were obvious, or because the questions were repetitive.

The first item of the Union's October 7 proposal was:

> *Union Recognition* and definition of the bargaining unit.

Diederich asked what Miller had in mind; Miller responded that he was seeking the recognition of both the International and Local 1180. Diederich did not respond.[30]

The second item was:

> *No Discrimination* because of race, color, political or religious affiliation, sex, national origin, age, or membership in the Union or any other lawful organization. No discrimination in hiring against relatives of current employees.

Diederich asked if there was any particular problem with discrimination at the Sioux Falls plant; Miller replied that there was not, that the clause was just standard language. Ori asked Miller what he meant by political affiliation; Miller responded that it would include Republican, Democrat, Socialist Party Member, and even Ku Klux Klan and Nazi Party members. Diederich replied that he may not agree that Respondent would have to hire a member of the KKK or Nazi party because that would be disruptive, especially since they had minority group members working at the plant. Diederich asked why ''current'' had been written into the proposal; Miller responded that it was meaningless. Diederich asked what relatives were included in the Union's proposal; Miller responded that included all relatives. Diederich stated that there were problems when spouses were working for spouses and children were working for parents, and it was not good personnel practice, and it appeared that the parties would have a problem on that. Diederich further pointed out that the clause only mentioned hiring and asked if that was the Union's intention; Miller responded that it would apply to promotions, shift preference, and all other personnel matters.

The third item was:

> *Bulletin Boards* available for posting of Union notices.

Diederich asked questions as to how many bulletin boards the Union wanted; did they want to use Respondent's; what locations did the Union have in mind; who would pay for the boards; would they be locked; what type of notices would be permitted; and how it (or they) would be policed. Miller responded that he was looking for one bulletin board; that he was not interested in using any of the ones the Company already had; that the Union would not pay for it; that the topics would include notices of union meetings and election of officers; and that the Union did not intend to make derogatory remarks about the Company on the bulletin boards; Dunkelburger said that the Union would be willing to show the Human Resources Department what was going to be posted, but that the Union would do so only as a matter of courtesy, not as a matter of getting permission. When Diederich asked where the bulletin board would be located Miller responded ''after I have gone through the plant, I will have a better idea about that''. Diederich did not respond.[31]

The fourth item of the October 7 union proposal was:

> *Seniority*: plant-wide seniority rights. 30-day probationary period. Union notified weekly of new hires and quits. Company to give Union complete seniority list every 60 days.
>
> *Layoffs*: 5-day notice of layoff. Employees in the affected classification given option of taking layoff in descending order of seniority, without any penalty on unemployment compensation. If there are insufficient volunteers, then least senior employees plantwide will be laid off. Anyone taking voluntary layoff shall have option of returning to work at the end of the time the layoff was expected to last, provided they have seniority over those still working.
>
> *Recall*: 5-day notice of recall sent by registered letter. Recall to old job when it opens up, even in case of voluntary layoff.
>
> *Loss of Seniority*: If laid off for more than 3 years; if out on medical leave for more than two years; if discharged for just cause; if employee quits; if absent for 3 consecutive working days without notifying company unless unable to do so.
>
> *Shift Preference*: If 2nd or 3rd shift starts up, company shall offer day-shift employees the transfer in order of seniority. If there are insufficient volunteers, company may transfer least senior employees.

Diederich asked what ''plant-wide seniority rights'' meant; Miller replied that the Company would follow seniority in layoff, recall promotions, job postings, and shift preferences ''and things like that.'' Virag pointed out that the Company then had a 90-day probationary period and Diederich asked if Miller was talking about 30 working or 30 calendar days; Miller responded that a 90-day, probationary period was too long and he was proposing 30 working days. Diederich asked what if an employee got ill during his probationary period; Miller stated that the period could be extended only mutual agreement and possibly the Union would agree to 45 calendar days to include such contingencies. Diederich asked if probationary employees would be eligible for holiday pay; Miller replied ''yes.''

Diederich pointed out that weekly notice of new hires and quits was quite bit to ask: Miller replied that monthly might be acceptable. Diederich asked if by ''quits'' the Union really meant what it said, or was it asking for 11 terminations; Miller replied that it was asking for all terminations. Diederich asked why the Union needed complete seniority lists every 60 days if its going to get monthly updates, and stated that 6 months would be more reasonable; Miller responded that that would probably be all right with the Union. Miller suggested the parties at some point agree on a ''base line'' seniority list that they could go forward with; Diederich agreed. Diederich asked what the Union would be proposing for employees hired on the same day: Miller re-

[30] Tr. p. 8883, L.9, is corrected to change ''applause'' to ''pause.''

[31] Credited testimony of Diederich and Ori over Miller, as discussed above.

sponded that ''on odd days, you go in an A to Z [order] and for people hired on even days, Z to A.''

In discussing the paragraph entitled ''Layoffs,'' Diederich asked if the notice of layoff was to be 5 working or calendar days; Miller replied ''working.'' Diederich asked what the ''option'' Miller was talking about; Miller responded that in the event of a layoff the Company should get volunteers and they would be laid off first; if there were not enough volunteers, lay off employees in order of reverse seniority. Miller added that anyone taking voluntary layoff could return if the layoff lasted longer than expected. Virag, according to Diederich, said respondent had experienced some real problems in the past when it had allowed employees to volunteer for layoff[32] because some employees could not make up their minds; others would have to check with their husbands;[33] and that employees came back when layoffs went longer than expected and asked that employees who were not laid off originally be bumped out of their jobs. Virag concluded ''it was a mess'' and Respondent was ''not too interested'' in it. Diederich asked how volunteers would be solicited, and Miller replied that a list should be posted for employees to sign. Then the parties got into a discussion of what happens when employees of different classifications sign up, or do not sign up, for voluntary layoff and which employees could be bumped into pools consisting of employees of other classifications. Virag asked what would happen if a ''key'' employee were needed, but had less seniority than other employees; Miller responded that the parties could work something out on that. Diederich asked what the phrase ''without any penalty on unemployment compensation'' meant; Miller replied that if an employee had volunteered for layoff, the Company should, when asked by the South Dakota Unemployment Commission, say that the employees were laid off for lack of work.[34] Virag responded that would cause problems and that he would tell the South Dakota authorities exactly what happened. Dennis Painter asked why Respondent could not reply that it was lack of work anyway, since someone had to be laid off. Virag responded that when employees who had been employed for only a short time take voluntary layoff, the account of a prior employer gets charged; then the prior employer complains to the State that there was a voluntary quit and it should not be charged to that employer; then the State demands explanations from Respondent and it becomes another difficult situation. In discussion of this section, Miller acknowledged that there had been some problems with voluntary layoffs in Minneapolis, but employees in Sioux Falls liked it; he agreed to ask Minneapolis union representative Rocky DeMayo how well it worked there.

Ori asked if the Union included the annual inventory shutdown as a layoff to be controlled by seniority. (The inventory shutdown is to be distinguished from the annual summer shutdown discussed later.) Ori said that he was asking because Respondent normally uses people who are familiar with handling inventory during such periods. Miller replied that seniority should still be followed, but the Company should write up a proposal on the matter.

In regard to ''Loss of Seniority,'' Diederich asked what ''without notifying the Company unless able to do so'' meant; Miller replied that if an employee were unconscious in the hospital he would not have to call in. Diederich replied that that was an easy case but suppose someone was in a cabin somewhere and decided to stay there for 3 more days and there was no phone; then they would be unable to call in, but by their own choosing. Meinders suggested that someone might be in jail for 3 days for drunk driving or something and did not call in; Virag and McCartin replied that Respondent had an assembly line operation and needed to have them there. Miller acknowledged that he could foresee very few occasions where an employee would not be able to call in for 3 days.

Regarding ''Shift Preference,'' Virag asked if Miller was talking about just assigning a few employees to a shift to do some extra work; Miller replied that he was talking about the late summer and fall buildups when an entire shift was started and that the Company should first transfer volunteers and then the least senior employees. Ori and Virag asked how the Company could do that since to start a new shift they would need some of their more experienced employees; Miller insisted this still should be done by seniority and that the Union would prevail upon the employees desired by Respondent to accept volunteers for assignment to the new shift. Diederich asked if a shift was going to work for a short time would all these provisions apply, adding that sometimes the second shifts are maintained for only a 2-week period; Miller replied that the Union would be willing to look at criteria for determining what would constitute establishment of a shift.

The fifth item was:

> *Hours of Work*: 40 hours per week, Monday through Friday, 7:00 a.m. to 3:30 pm. 30-minute lunch, two 15-minute paid breaks. Five minutes wash up time before lunch and quitting time. Guaranteed 36 hours per week (no sending people home for lack of parts more than 4 hours per week).

Ori stated that some unit employees did not report to work precisely at 7:30 and work until 3:30; some reported later, some earlier. Miller replied that something could be worked out on that. Diederich asked if the 30-minute lunch period would be on paid time: Miller replied that it would not. Diederich made no comment about the provision for two paid 15-minute breaks during the day. Diederich asked if the 5-minute washup time applied to all employees or just those who were in specific jobs in which employees might be getting dirty. Miller replied that it would apply to all employees. Diederich asked if the 36-hour-per-week guarantee applied only for lack of parts and asked what happens if there is a power failure or some other event causing a disruption of work; Miller replied that other types of downtime would have to be covered elsewhere in the contract. Miller added that this provision was in there because employees had complained about being sent home for lack of parts; Virag replied that it had not happened often. McCartin asked what would happen if the Company ran out of parts and, rather than send employees home, Respondent assigned employees to work on jobs which were higher-paying; Miller replied they would be paid the higher rate. McCartin asked if em-

[32] Layoffs by volunteers first was allowed in some preceding layoffs, but not in others.

[33] Most of the unit employees were women.

[34] On cross-examination, Miller first stated that he told Virag this would not be a lie since somebody had to be laid off; then Miller acknowledged that he could have said it was only ''just a white lie; that was O.K.''

ployees were given ''make work'' in a lower paying job, what happens; Miller replied that they would be given the rate of their regular job. Diederich asked if employees were sent home for lack of parts on Monday, and they were paid the 4 hours, and they were required to work 10 hours on Tuesday and 10 on Wednesday, would the 4 hours (in which the employees did nothing and got paid) count toward overtime; Miller replied that the employees would then be working in excess of 8 hours a day and that would be on overtime.

The sixth item was:

> *Overtime*: all voluntary overtime. Notice for Saturday overtime by noon on Wednesday; notice for daily overtime by noon of the preceding day. Time and one half after 8 hours in a day, after 40 hours in a week, and for all work performed on Saturdays. Double-time for Sundays and for work on holidays (plus holiday pay).

Diederich asked what would happen if the Wednesday, or other day that notice of overtime was to be given, was a holiday; Miller replied that the notice of overtime had to be given the day before. McCartin said that he could not operate the plant if all overtime was voluntary. Diederich asked what would happen if enough employees did not volunteer for needed overtime and Miller replied ''then you don't work overtime.''[35] Miller said that the Union would prevail upon enough employees to work overtime to staff Respondent's need; Diederich replied what would happen if Respondent still did not get enough volunteers; Miller responded that they would get them; and this exchange was repeated several times. Miller further stated that overtime should be equally distributed, although that demand is not in the words of the proposal above. Diederich asked how it could be done and Miller responded that each supervisor would have to keep records.

The seventh item was:

> *Call-in and Report-in Pay*: guaranteed 4 hours pay unless notified 12 hours prior to starting time not to report for work. 8 hours pay on snow days.

Diederich asked how the provisions would work; Miller responded that employees who were called back to work (or who were regularly scheduled for work and reported but the plant was not operating that day) would receive a minimum 4 hours' pay. Diederich asked what would happen if, for example, a maintenance man came to work and there was only 1 hour of work for him to do and he was given make-work; Miller responded that he would be paid a higher rate if the work he did fell within a higher classification and the same rate if he was given work fell in a lower classification. Diederich asked what would happen in the case of a power failure or other event out of Respondent's control; Miller responded that the provision would not apply. Diederich asked how 12 hours' notice could be given to so many employees and there was a brief discussion of how employees could be notified through radio announcements. Diederich asked how ''snow days'' could be established; Miller responded that it was discretionary with the Company, but all employees in the bargaining unit would be paid 8 hours if a snow day was announced.[36] Diederich asked what if a snow day was one of the 9-hour overtime Saturdays often worked in the autumn. Miller replied that the snow day would then be worth 9 hours. Diederich asked what happens if a blizzard comes in during the day; Miller replied that the employee should be paid for the whole day, 8 or 9 hours, whichever was scheduled. One member of the Company's bargaining committee asked if the employees were scheduled to work on a Saturday and were not needed, would they get 4 hours straight time or 4 hours time and one-half; Miller replied 4 at time and one-half.

Bargaining Session No. 3; October 16, 1980

There were some preliminary discussions before the parties got back to the Union's October 7 proposal. Miller asked if the employees were scheduled for a 9-hour day and were sick, would they be paid 8 or 9 hours: Virag responded 8. Miller said he heard some supervisors were paying 9 and Virag said they should not be. Dunkelburger said some supervisors paid sick days even when children are sick; Virag responded that if that was true it should not be because sick days are to be paid only for employees being sick. Miller stated the parties would be spending a lot of time discussing seniority; Diederich replied that that would be a good thing because if arbitration were agreed upon it would be good to have a record of negotiations for the arbitrator to consider if it came to a question of what the parties had meant by their language. Then the parties picked up where they left off the day before.

The eighth item of the Union's October 7 proposal was:

> *Jury Duty*: employees to receive difference between wages and jury duty pay. Also applies if subpoenaed to appear as witness in court.

Diederich asked if the wages would be 8 hours straight time; Miller replied that it would. Virag asked if mileage and meal allowances for jury service would be offsets; Miller replied that they would not. Diederich said that some trials last 2 or 4 weeks and there was a discussion of some long cases that the parties knew about; Miller replied that there would be no limit on a jury duty pay. Diederich asked what happens if an employee was on vacation or layoff and got called to jury duty; Miller replied that there would be no pay in those events. Diederich asked Miller what he meant by ''also applies'' in reference to appearing as a witness in court; Miller stated it should be paid just like jury pay, except that witness fees work as an offset. Diederich asked if it applied to an employee who was a party to a proceeding; Miller replied that it would not. Diederich asked if it applied to administrative hearings and arbitrations; Miller said it would. Diederich asked if it would apply if the employees were testifying against Respondent; Miller replied yes, but that the number of witnesses for which Respondent would have to pay could be set at six. Diederich asked if night-shift premiums would be included in jury duty pay; Miller replied that it would. There was a long discussion of what would happen if an employee got released from jury duty during the day and whether he should be required to report to work. Finally, Miller

[35] I discredit Miller's denial at Tr. pp. 2425, 2426.

[36] Previously, some employees got 8-hour pay for days of work canceled because of snow; other employees got 4 hours. Which classifications received which allowance was not established at the hearing.

agreed that if there were more than an hour left in the workday and the employee could get there, he should go to work.

The ninth provision was:

> *Funeral Leave*: 3 days with pay for immediate family or any relative living in the household. One day with pay for in-laws and grandchildren. Time off with pay to serve as pallbearers for funeral of another company employee.

Upon Diederich's questioning, Miller indicated that the provision would include aunts, uncles, and step-children living in the same household; and that it would include former spouses. Virag stated that Respondent then provided only 1 day's pay in the event of death for in-laws and grandchildren; Miller replied that the Union was proposing three. In regard to the pallbearers proposal, Miller, in response to questions, stated that it was not intended to apply to employees who had retired or were on layoff. When asked how many pallbearers would be covered, Miller said six honorary and six actual pallbearers. Diederich asked if he really meant a total of 12 paid employees to go to the funeral; Miller replied that he did. Diederich asked Miller if there would still be 3 days' pay if a relative died on Thursday and was buried on Monday; Miller replied that it was meant to be ''up to'' 3 days. Miller also acknowledged that the funeral leave provisions would not apply to an employee on leave of absence. Diederich asked if the employee was scheduled to work Saturday and became entitled to funeral leave would be straight time or time and a half; Miller replied that it would be time and a half because that is what the employee would have been receiving had he continued working.

The 10th item was:

> *Holidays*: One additional for a total of twelve.

In response to questions by Diederich, Miller stated that the additional holiday would be a floater (there was already one floater); the Company would give the Union several dates and the Union would poll its membership to determine when the floater would take place; that the holiday pay would be 8 hours per day even if the employees were working 9-hour days (as often occurred during the busy season); it would include night-shift premium; employees on leaves of absences would still get holiday pay; that an employee on layoff would get holiday pay only if he had been laid off within 30 days of the holiday; that probationary employees would get holiday pay; that if a holiday fell on a Saturday or Sunday it would be celebrated on a Friday or Monday, respectively; that employees on medical leave would receive holiday pay; and that employees on vacation would receive an additional day of vacation. Diederich made no responses to any of these answers by Miller.

The eleventh item was:

> *Vacations*: Five (5) days after six (6) months; ten (10) days after 1 year; 12 days after 2 years; 13 days after 3 years; 14 days after 4 years; 20 days after 5 years; 25 days after 10 years. Vacation to be taken at a time suitable to employees.

Diederich observed that the Union's request was more than currently provided; Miller agreed.[37] In response to questions Miller stated that the pay would be 8 hours per day plus any shift premium, and it would apply to employees on short leaves of absences, but possibly not long ones.

Diederich asked what the Union meant by ''at a time suitable to employees''; Painter replied that employees felt that they had earned their vacations and should be entitled to go when they wanted to. Diederich asked what would happen if 12 people on one line wanted to go on vacation at the same time; Miller responded that he was making just a general proposal and that the Company should come up with some language which would take care of that problem.

This last provision touched upon a critical issue. As both sides well knew, Respondent annually has a midsummer shutdown. Its employees' handbook stated only that ''employees will be encouraged to take vacations during that time.'' In early 1980 Respondent informed all employees that they would, that year, be required to take 1 week of their vacation during the plant shutdown. An uproar ensued. Management retracted its requirement for 1980, but on May 22, 1980 Virag issued a memo to all employees stating that in 1981 all employees would be required to take 1 week of their vacation during the shutdown. Compulsory vacations during summer shutdowns became a campaign issue, then a time consuming issue in the bargaining.

The 12th item was:

> *Wages*: Classify all jobs. Bring rates up to Minneapolis rates. Automatic progression up to job rate. Cost-of-living protection. Night shift premium of 10%. For temporary upgrades, get higher rate of pay; for temporary downgrades, retain former rate of pay. Group leader premium of 10% over highest job rate in the group. (Spell out Group Leader duties) Group Leaders not required to do Supervisor's work. Company to negotiate with Union over new jobs or changed jobs. No downgrading of jobs during life of contract. Temporary upgrades—company must ask most senior person in the next lower classification.

In response to questions Miller told Diederich that the term ''classify all jobs'' meant that the Union wanted to set up labor grades and the jobs would be classified and slotted into those labor grades; the term ''Minneapolis rates'' meant that the employees would be earning full amount of what was being earned in Minneapolis[38] by the end of the contract term, and progression should start with an immediate increase of 85 cents for all employees. Miller stated that the Union wanted job progression as it existed in Minneapolis (which was a starting rate and automatic increase after 3 months, 6 months, and 9 months to bring employees to the top of a job rate). Diederich asked if ''job rate'' meant the maximum of the labor grades; Miller replied that it did. Diederich asked if employees hired on the same day would be earning the same thing at the end of 9 months even if one was excellent and the other barely marginal; Miller re-

[37] According to the then-current employee handbook (G.C. Exh. 87), employees received 10 days' vacation after 1 year; 15 after 5 years and a credit of 40 vacation hours upon reaching the fifth anniversary; employees had to be employed 6 months before being eligible for vacation with pay.

[38] In some cases, this was as much as $2 per hour more for the same jobs than was paid in Sioux Falls.

plied that they would. Diederich asked what sort of cost-of-living clause the Union was looking for. Miller replied that the Union wanted the ''all cities index.'' Virag responded that did not make sense since there were regional indices and possibly one for Sioux Falls. Miller responded that it would all average out. Diederich asked Miller (concededly tongue-in-cheek) what sort of cost-of-living clause existed in Minneapolis; Miller acknowledged that there was no such clause in Minneapolis.

Virag pointed out that Respondent only paid 5-percent night-shift premium; Miller said the Union wanted 10. (This was another significant issue although, at the time, there was no night shift.) Diederich asked Miller if there was a 10-percent night-shift premium in Minneapolis; Miller acknowledged that the pay there was in terms of cents per hour. (Cents per hour, not a percentage, was the position the Company later took, and adhered to.)

Then followed an extensive discussion on temporary upgrades, downgrades, and transfers, what was meant ''by temporary,'' and when a transfer became permanent. Miller answered 211 of Respondent's questions, then got out the Minneapolis contract and read aloud the contract's terms on those topics and, at the same, retracted many statements he had just made. In essence, Miller acknowledged to Diederich that the Union was asking for the same provisions as in the Minneapolis' contract including provisions that upgrades be on the basis of seniority among employees who met ''minimum requirements.''

As the meeting was concluding Miller asked Diederich if he was going to come back with proposals of his own. Diederich replied that he did not intend to do so at that time, that he would prefer to continue through the Union's statement of general principles and then when that was completed come back with a statement of general principles of Company objectives. Miller responded that that would be ''fine,'' according to the credible testimony of Diederich.

Bargaining Session No. 4; October 23, 1980

The meeting began by Diederich's summarizing Miller's position on temporary upgrades and transfers.[39] Ori pointed out that it would not make sense to promote an employee who was not as good as one who had less seniority; Miller restated that that was the Union's proposal. Diederich asked if there were 8 hours of work to be done and someone had to be transferred could Respondent, for purposes of training, transfer two employees for 4 hours; Miller said no. The parties discussed a hypothetical posed by Ori; Miller answered questions, ultimately, by stating that seniority was the controlling factor in all union demands on this issue.

Then the parties got back to Item 12, ''Wages,'' and discussed group leaders. Diederich asked Miller what he meant by ''10 percent of highest job rate in the group''; Miller responded that it was 10 percent above the highest paid person. Virag stated the group leaders were moved around and asked what would happen if a group leader were transferred to a line in which the highest paid person made less than the highest paid person on the line the group leader was leaving: Miller acknowledged that the group leader would then take a pay cut. Ori posed an example of a person already making 10 percent more than the next person on the line being made a group leader; Miller acknowledged that there would be no increase in pay at all.

The parties then discussed the responsibilities of group leaders. Miller and other members of the union committee said that group leaders should not be required to report rule infractions or recommend discipline. Diederich responded that supervisors made their own decisions but that group leader should report infractions and recommend discipline, and he wanted those responsibilities stated in the contract. Miller disagreed, stating that if it was stated in the contract group leaders would feel they had to do it. Diederich agreed that Miller was right, and indicated that this was what Respondent wanted.[40]

Diederich asked Miller what he meant by the ''new jobs or changed jobs'' clause of item 12. Miller stated he was relying on the Minneapolis contract and that the Union was proposing that if the Company created a new job after 30 days the Union could request negotiations about it; if no agreement was reached within 20 days thereafter, it could go to arbitration; the arbitrator would decide what the rate would be and the pay would be retroactive to the date the job was initiated. Virag noted that there was no time limit on when the Union must demand negotiations and that it could be 6 months or more before the arbitration decision was rendered and the Company would then be responsible for a large backpay liability. Miller stated that that was his proposal, however the Union could possibly agree to a time limit on demanding negotiations or arbitration. Ori asked what constituted a change in jobs; Miller stated anytime an employee had to work harder he should get more money. Ori stated that jobs were frequently changed; Miller said that his proposal would always apply.

The 13th item of the Union's October 7 proposal was:

> *Sick Days*: 12 per year. If not used, company will pay for unused sick days at end of the year. Sick days not to be counted as excused absences.

In response to questions, Miller said that he was proposing basically the same program that Respondent had then, plus the Company should pay off unused sick days. In discussing the present practices Virag stated that it was 12 days for employees hired in January, but those hired in February had 11; those hired in March had 10; etc. Miller stated that any employees excused for being ill should not have that day counted against them as an unexcused absence. Then followed a long colloquy about employees abusing sick leave privileges. Diederich asked if Respondent could require documentation of illness; Miller responded that it could be up to 3 days a month and no excuse could be required; Virag pointed out that this would mean that an employee could be absent 36 days a year and the Company could do nothing about it; Miller replied that if an employee was sick, he was sick, and there was nothing the Company could do about it. Diederich asked if, like other provisions, 8 hours' pay for sick days

[39] I discredit Miller's testimony that the meeting began by discussion of insurance; that topic came up later in the meeting in the context of the discussion on item 15.

[40] Although he did not mention it on direct, Miller added on cross-examination that Diederich said that group leaders should have the right to discipline, as well as recommend discipline and they should make their own independent investigations. Miller further testified that Diederich stated there were not enough supervisors so group leaders would have to be able to do ''supervisors' work.'' Diederich credibly denied such remarks.

was all the Union was asking for and if the pay would include night-shift premiums; Miller replied affirmatively to both questions.

The 14th item was:

> *Sickness and Accident*: guarantee present benefits (balance of 12 sick days at 100%; thirteenth through sixty-fifth day at 80%; sixty-sixth day through 130th day at 60%). Long term disability coverage.

The declining percentage coverage after 12 and 65 days was then the current policy and there was no discussion on that. The parties discussed what constituted a ''long term disability''; Virag explained how employees could sign up for long-term disability programs if they opted to do 80 and that the payments were tied into social security disability payments. Virag also stated that if an employee's doctor said that any employee was permanently disabled, the Company could require examination by its own doctors; Miller stated that there should be a provision for a third doctor and that the Company pay for it; Virag disagreed. There was discussion about employees falsifying claims for injuries by stating that injuries employees received elsewhere had occurred on the job. Virag stated it should be grounds for discharge; Miller acknowledged that it should be grounds for some discipline, but not discharge.

The 15th item was:

> *Health Insurance, Dental and Vision Care*: guarantee present benefits. Company to pay full cost of insurance for dependents as well as employees.

Diederich asked if by ''guarantee'' the Union intended to simply write the present program into the contract; Miller replied that it did except that the Company was to pay for full cost of dependent coverage as it did then for employee-only coverage.

Diederich said that while they were on the topic he then had the specific figures for the premium increase ''which is coming due on November 1.'' Diederich stated that the total premium for employee-only health insurance (not dental) coverage was $32 and that the Company was proposing to continue to pay that so that the employee's cost would still be zero. The premium increase for dependent coverage was then $20 and would be increased to $29 for the employee, while the employer's cost would increase from $65 to $95. Miller responded that there had been an increase in Minneapolis but it was not so great. Diederich stated it was due to a difference in experience at the plant; there were many child-bearing age women working there. Lawson asked if it could be delayed another month; Diederich replied that it had already been delayed 2 months and that it was due on November 1, ''and that our proposal [is] to increase it from the $20 to the $29 if we [are] unable to reach some other agreement before November 1.'' Miller stated that Respondent should pay for at least one more month; Diederich countered that there would be no way for Respondent to recoup the money that it would pay out in that month. Diederich further added that the dependent coverage was still on a 76/24 percentage basis, as the premiums had been shared previously, the Company paying the larger percentage. One member of the union committee asked why Respondent was willing to pay it for September and October, and not November and Diederich, according to his testimony, responded, ''we weren't going to make an insurance increase unilaterally.''[41]

On the topic of increases in health insurance premiums Miller acknowledged on cross-examination that he took a firm position that the Company was to assume all increases; he never agreed that employees pick up any increase in the cost of insurance.

The 16th item of the Union's October 7, 1980, proposal was:

> *Life Insurance*: guarantee present benefits.

Diederich asked Miller if by ''guarantee'' he meant that he was asking for retention of present benefits; Miller responded that he was. One member of the union committee asked Virag what the provisions were; Virag replied that there was a basic $10,000 policy paid for by the Company and that optional programs could be picked up at additional cost to individual employees.

The 17th item was:

> *Supervisors*—not to do bargaining unit work.

Diederich asked if Miller was talking only about supervisors because certain persons, such as engineers, occasionally do test work on the production lines; Miller responded he had no objections to that; he just did not want supervisors replacing employees. Diederich and Ori stated that sometime supervisors will do work such as getting wires or other parts when needed to continue the production flow; Miller responded that it should not be done on a regular basis, and, if it was, the Employer should hire more employees.

Bargaining Session No. 5; October 24, 1980

After a preliminary discussion regarding a rumored slowdown (which never materialized) the parties continued with their discussion of the Union's October 7 proposal.

The 18th item was:

> *Leaves of Absence*: Personal leave of up to 60 days. Leave of absence for Union activity. Military leave and leave for National Guard duty.

Initially Diederich asked if the phrase ''up to 60 days'' meant that it was mandatory; Miller replied that the Company could not unreasonably withhold the granting of sick leave. In response to questions by Diederich, Miller or sometimes Painter stated that ''personal'' was for such matters as

---

[41] As well as testifying that the exchange regarding insurance premiums occurred at the beginning of the meeting, Miller also testified on direct examination that Diederich responded to a question about the timing of the increase by saying that it would not have been a good time to do so ''right before the election.'' Miller's pretrial affidavit stated on this point:

> Diederich said, ''Well, it would not have been a very good time to do it.'' To me this indicated that they would not have done it in August before the election.

Plainly, Miller's affidavit constituted testimony that Diederich did not say that the increase was withheld because it was ''right before the election.'' In addition, the summary used by Miller to prepare for trial has a marked-out sentence reading: ''MD I didn't do sooner right before election.'' After this marked-out sentence is inserted ''Well, it won't have been a very good time to do it.'' Clearly Miller's testimony that Diederich stated flatly that the insurance premium was not passed along because it was ''right before the election'' was not what Diederich said. Moreover, Diederich credibly denied making such a statement and I find that the exchange occurred as testified to by Diederich.

taking care of sick parents; that if Respondent found out that false reason was given for taking the leave of absence, Respondent could discipline the employee but not discharge him; that seniority continued to accrue during a leave of absence; that there should be written records of the request and the granting of the leave. Miller asked Virag what happened when employees did not return on time from a leave of absence; Virag responded that they are automatically terminated and they do not get 3 additional days to report.[42]

The parties then discussed union leave. In response to Diederich's questions Miller said he proposed no limits on the amount of leave that would be granted if an individual takes a job with the Union (and that he had been on leave for 12-1/2 years from a plant to work for the Union); there were three types of union leave which would probably come up; namely, an annual union convention to which one or two people would go, district council meetings which were held three or four different times a year in different cities (held on weekends but a Friday off may be necessary also), and legislative conferences. Diederich asked if there were any others, specifically did the Union want leave granted to organize other Litton plants; Miller said yes; Diederich told him not to count on it. In response to other questions Miller said that the Union was proposing that the Company pay the differential between National Guard pay, based on 8 hours a day or 40 hours a week, plus any night-shift premium.

After a short discussion Miller agreed that employees should not use leaves of absence to secure other employment. In response to further questions Miller stated that the Union's position was that if there were a pay increase granted during a employee's leave of absence, the employee would still receive it Diederich responded that the theory of automatic progression was that an employee acquires more skill as he stays on a job, but if he were on a leave of absence that theory would not apply. Finally Miller proposed that for leaves of absences of 5 days or less a supervisor should be allowed to approve it without going through Respondent's human resources department; Diederich did not respond.

The 19th item was:

> *Job Posting*: All jobs posted for three (3) work days. Jobs awarded to senior bidder who meets minimum requirement of the job. Minimum requirements of each job spelled out in the contract. Company to provide training programs at company expense. Provide method for advance bidding of jobs.

In response to questions, Miller stated that the reference was just to bargaining unit jobs, and he was not sure about whether the Union wanted group leader jobs posted. Diederich stated that Respondent considered the group leader job was a stepping stone to management ''and that we probably would not want to post group leaders jobs.'' Miller took the position that, as is the case in Minneapolis, jobs should be awarded on the basis of seniority to an employee who met minimal qualifications, that job posting should not include the requirements of the jobs, and that employees should not have to list their qualifications with the bids. Virag and Ori commented that sometimes the Respondent does not know all of the qualifications an employee has because he may have received outside training and Diederich noted that there was no consideration in the Union's position for the fact that some employees who met minimal requirements might be more qualified than others but have less seniority. There was an extensive discussion of training programs; Miller stated that Respondent should pay for all training programs, even if they were voluntary, and that employees should be selected to attend training programs on the basis of seniority. Diederich responded that simple seniority would not work efficiently and that Respondent would want to consider other factors such as attendance.

In regard to bidding, Diederich asked if the Union was proposing any limits if an employee did get a job, or got a job and could not perform satisfactorily. Miller replied that in either case there should be no limit on an employee's bidding for another job; Diederich replied that if an employee got a job he ought to stay on it if he could do so and that if he did not work out there ought to be some limit on when he can bid again. Diederich stated that if an employee got a job and could keep it, he should stay there because Respondent has gone through the expense of entertaining bids and training the employee; he did not give a reason for stating that an employee who got a job, but could not keep it, should be limited on when he can bid again.

There was some discussion of what constitutes a permanent job for which posting would be necessary; Miller stated that if there is a 15-day vacancy in a 3-week period then it should be up for bidding as in the Minneapolis contract; Diederich replied that the reason for the vacancy (such as sickness which he said everyone knows would be temporary) should be considered.

Diederich asked Miller what the Union proposed to do if a job bidding award process conflicted with a EEOC conciliation agreement requirement. Miller responded that he did not know what would happen; but he would write to the UE office in New York to get an answer on that. The meeting ending at that point.[43]

Bargaining Session No. 6; November 5, 1980

After preliminary discussion regarding a transfer Lawson had received and a few comments about the job posting procedure issue, Miller stated that he had sent a letter to the International office regarding the issue of possible conflicts between job bidding an award and a discrimination conciliation agreement.[44] Then the parties resumed their discussion of the Union's October 7 proposal.[45]

The 20th item of the Union's October 7 proposal was:

> *Discipline*: No discipline or discharge except for just cause. Right to have steward present during disciplinary meetings. All existing disciplinary notices to be removed from employees' files on the effective date of the contract, and removed thereafter 6 months after date of occurrence.

[42] This was a reference to the much discussed policy, then in effect, that employees who failed to report for 3 days were terminated.

[43] I credit Diederich and find that neither grievance procedures nor discipline were discussed at the October 24 meeting.

[44] Miller denied this, but I credit Diederich.

[45] In his testimony Miller combined the discussions of November 5 with those of November 6. Diederich was clear on which topics were discussed at which meeting, and I credit his testimony.

Diederich asked what the Union meant by ''discipline'' and did it include things like a supervisor giving a verbal warning to an employee. Miller responded that it would include any matter that went into an employee's personnel file. Diederich asked if the Union were going to propose progressive disciplinary procedures; Miller replied that the Union was not proposing any type of provision regarding discipline. Diederich asked what Miller meant by ''just cause''; Miller replied that he was not going to define it. Then Diederich posed several hypotheticals to Miller asking what would constitute just cause for discharge including stealing, the sale of drugs, being drunk on the job, falsification of an employee application, indecent exposure, failing to call in for 3 days although the employee can do so, falsifying reasons for sick pay, sleeping on the job, and other matters. In each of these instances Miller replied that the Union was not going to negotiate work rules, that Respondent should do what it thought it had to and the Union would file grievances. Miller replied to several of the posed hypothetical by stating that it would depend on the circumstances whether any discipline would be warranted at all. Diederich replied that Miller was answering that applications of rules might or might not be valid, but the question was whether Miller would agree to some type of listing of work rules. Miller repeated that the Union was not going to agree to negotiate any work rules.

In response to questions Miller stated that stewards should be present during meetings at which discipline or discharge was dispensed as well as investigatory meetings. He also stated that if there was disciplinary action on the production floor the steward would have to be present if the employee requested it; but, otherwise, stewards would have to be present whether the employee requested it or not. Diederich responded that stewards did not have a right to be present when discipline was simply being dispensed and that the Respondent was not proposing to have stewards present during such interviews. Diederich also stated that if someone was going to be fired, Respondent wanted him off the property as soon as possible. The parties repeated their respective positions several times.

Diederich asked Miller why the Employer should purge the files of all disciplinary notices upon ratification; Miller responded that a lot of warning notices were issued because of things that happened during the election campaign. Diederich (rhetorically) asked if all outstanding charges against Respondent would be dropped at the signing of a contract.

Diederich asked if probationary employees were discharged, would they have a right to file a grievance; Miller responded that he could not answer at that time.

The 21st item was:

> *Safety and Health*: Union safety committee. Employees can't be required to perform unsafe operations. Company to pay full cost of required safety equipment. For work-related disabilities, company to pay benefits during waiting period for workers Compensation. Company to find suitable work for insured workers. Company must post signs, warnings, and first-aid instructions wherever hazardous materials are used.

In response to questions by Diederich, Miller stated that the union safety committee would be elected from the membership; it would have representatives from various areas of the plant; they would meet with the Company on safety matters on a regular basis; they would discuss training films and other matters relating to safety; they would have not have the right to shut down a job because that would be management's decision; employees would have a right to call safety committee members during working time to discuss safety problems and the employees and the committee members would be paid; investigations would last as long as it took to resolve a problem, although it could not be more than a ''reasonable time.''

There was an extensive discussion as to what happens if an employee thought a condition was unsafe and the supervisor disagreed. Miller stated that employees would not have a right to walk off a job because of a safety-related reason but that the decision would rest with the superintendent, McCartin, and a grievance could be filed over his decision.

In regard to the proposal that the Company pay for safety equipment, Diederich acknowledged that if Respondent required certain equipment it had to pay for it. Virag did say that after the employees lost a few pair of safety glasses the Company did charge them for a portion of further replacements. Diederich said that sometimes Respondent required employees to wear long pants or shirts during the summer rather than short pants or skimpy tops because it was unsafe and asked if the Union expected Respondent to pay for that. Miller replied that it did not.

Diederich asked what Miller meant by payment of benefits ''during waiting period for workers' compensation.'' Miller explained that workers' compensation benefits are not paid until the 7th day of an absence for a workers' compensation injury; the Union was proposing that the Company pay for the first 6 days.

Diederich asked if the Union agreed that if employees falsified workers' compensation claims that they should be discharged; Miller replied that they should not get the workers' compensation payment, but they should not be discharged; Virag responded that they should be discharged.[46]

Diederich asked if the Union was proposing ''make-work'' in reference to the ''suitable work'' requirement for injured workers. Miller said that the Company could always find something for employees to do; Diederich replied that Respondent would try to accommodate employees injured on the job, but it was not going to create make-work. Virag stated that even where employees are injured on the job, there comes a point where, if they missed enough work, they are no longer of any value to the Company and should be fired; Miller responded that an employer was never justified in terminating anyone who is injured in a job-related accident.[47]

Bargaining Session No. 7; November 6, 1980

The parties continued with their discussion of safety and health where it ended the day before. There was a long discussion about what a ''dangerous'' chemical is and just where warning notices should be posted. When the parties finished that item, Miller presented a detailed grievance procedure proposal rather than discuss item 22, ''Grievance Procedure,'' as it was stated on the October 7 proposal. The

[46] Such exchanges were as close as Miller got to discussing work rules before bargaining session No. 34 on April 8, 1981.

[47] Miller testified that a discussion about plant tours occurred during this meeting; Diederich denied it; I credit Diederich.

Union's proposal for grievance and arbitration submitted on November 6 was long and involved. It is not necessary to quote the proposal itself, but the exchanges over the terms (which will be apparent) are relevant as they reflect the early positions of both parties.

In response to questions by Diederich, Miller stated that the Union's definition of grievances included all terms and conditions of employment and not just those mentioned in the provisions of the contract; that there was no provision for requiring that a certain article of the contract be specified in the grievance because stewards might make a mistake and the Union did not want to get ''sandbagged''; and that specification of clauses can be made when the parties go to arbitration. To the last statement Diederich replied that that was not fair because the Company may base its decisions on how to handle a grievance according to what section of the contract the Union originally claimed to have been violated. Diederich pointed out that the Union's filing procedure did not even include stating the nature of the grievance, much less what section of the contract was alleged to be violated. Miller responded that the Union could agree to placing the nature of the grievance on the document when it was written up, but it still did not want to state what section of the contract had been violated. Diederich asked if an arbitrator would be confined to the remedy requested; Miller said that it was up to the arbitrator as to what he wanted to award. Diederich objected that that was not fair; the Union should be ''stuck'' with the requested remedy and that the Union should educate its stewards on how to file greivances. Miller agreed with Diederich that a multiple copy form which would reflect the disposition of the grievances at each step should be used. Miller agreed with Ori that if an employee works Saturdays that a Saturday should be included in the 5 days which the grievances had to be filed. Miller agreed with Diederich that this 5 days should began running from the time employees should have known that cause for a grievance had arisen.

Diederich asked how step 2 would work; Miller responded that the employee would request permission to discuss a matter with the steward and the steward would handle the grievance, all of which would be on paid time, and that the supervisor could not deny a request to consult with the steward. In response to other questions by Diederich, Miller stated that the Union would not agree to a provision that a steward could settle a grievance at step 2 without the consent of the employee because unions were being sued ''over the way they handled grievances.'' Diederich said 5 days for moving from step 1 to step 2 is too long: Miller agreed to 3 days. In response to a question Miller stated that there could be two or three employees at the second-step meeting including chief steward, department steward, and possibly the employee if the Union so chooses: Diederich argued that was too many employees out of production to handle a grievance and that that it should be handled for the Union by the chief steward only. Miller stated that the Union wanted a monthly third-step meeting; Diederich responded that the Company was opposed to that because of potential backpay liability—he did not want to have the ''meter'' running while the parties were waiting for the third step; Diederich stated that he would want the third-step meeting to be within 3 days of the second-step answer; Miller stated he would not want to come from Minneapolis for as many meetings as such an agreement would require. Diederich asked if the union representative would have the authority to settle grievances at the third step. Miller stated again that it could not be done without the consent of the employee because of the potential of lawsuits against the Union. Diederich pointed out that he thought that 45 days were too long for the Union to take to make up its mind whether it wanted compulsory arbitration, as the proposal demanded; 2 weeks would be adequate. Diederich further stated that the Company was not interested in having arbitrators from the Minneapolis region of the Federal Mediation and Conciliation Service and would want an arbitrator who ''was familiar with Sioux Falls mores, practices in the community, the rates in this community.'' Diederich gave an example that if the Company agreed to arbitrate a new rate for a new job, and ''it goes to a arbitrator in Minneapolis, we don't want a Minneapolis arbitrator setting a rate for a job here in Sioux Falls. We want somebody from Sioux Falls who is familiar with Sioux Falls rates setting it up.''

Diederich asked if the ''final and binding'' language of the proposal meant that the Company could not go to district court in an attempt to vacate an arbitrator's decision; Miller replied that the Company always had that right but he did not want to say so in a contract because employees would misunderstand.

In response to several questions by Diederich, Miller stated that all grievance handling would be on time paid for by Respondent. Diederich replied that the Company would prefer that meetings take place during nonworking time and, if an employee felt strongly enough about a dispute to file a grievance, he should be willing have it handled after hours. Diederich added that this would eliminate frivolous grievances by employees and make supervisors more careful in making management decisions because they would know they would have to stay after work to defend them. Diederich added that he was concerned that there were large numbers of employees who did not have industrial experience and would be prone to file grievances over ''every little inconvenience.''

Diederich asked what the union was looking for in terms of giving the steward and chief steward the opportunity to investigate grievances: Miller replied that they would have to be granted time off to talk to employees and do what investigation they needed. Diederich replied that that would be from five to seven employees pulled off an assembly line to discuss grievances and he thought it should be done after work. Miller stated the chief steward should be given reasonable time to investigate grievances on working time; Diederich responded again that the matter should be taken care of after work. Diederich asked what would happen if the chief steward were abusing his right to have time off or to go to various areas of the plant to investigate grievances; Miller responded that the Company should tell the Union about it and the Union would straighten it out. Diederich asked if the Company could file a grievance against the Union if such a thing happened; Miller said that the Union was not proposing that the Company could file grievances.

The proposal called for ''top seniority for purposes of layoff and recall only'' for five members of grievance committee, stewards who would be appointed for various departments, ''and local officers.'' The parties began discussing what they considered to be ''departments'' and it turned out

that Miller was talking about 40 employees who would be designated as stewards who would have superseniority for purposes of layoff and recall.

In response to questions Miller stated that he was proposing that if a grievance session went beyond the end of the workday, the employees would be paid time-and-half overtime; Diederich responded that that was all the more reasons for handling grievances on the employees' personal time.

Finally, Diederich asked if the Union was really proposing that the chief steward could make calls at any time to discuss union business. Miller responded yes. Diederich replied that could mean that the employee could spend the whole day on the phone; Miller responded he would probably get a sore ear.

After discussion of the Union's separate grievance procedure proposal, the parties returned to the October 7 union proposal. They passed number 23 ''Layoff Deferment,'' which stated that union officers and stewards would have top seniority for purposes of layoff and recall only, by noting that the provision was covered in the grievance provisions discussed previously. Then the parties resumed discussion of the October 7 proposal.

The 24th item was:

> *UE Representatives*: shall have access to the plant for Union business.

Diederich asked what Miller was talking about; Miller stated that he would call Virag to make appointments to come in to investigate grievances and hold noontime meetings with employees in the cafeteria. Diederich responded that supervisors and nonbargaining unit employees used the cafeteria and he did not see how it was possible for union meetings to be held there. There was no discussion of a ''tour'' at the November 6 meeting.

The 25th item was

> *Dues Check-off*: employees signing an authorization card may have Union dues deducted directly from their paychecks.

In response to questions Miller told Diederich that he would get him a dues-checkoff authorization card to examine; the membership had voted that monthly dues would be twice the hourly rate of employees; that as wage increases were granted there would be a commensurate raise in the dues; dues would be deducted weekly but paid monthly to the Union; that the Union wanted the ''Morrell's'' union-security provision;[48] and that initiation fees would be deducted also. Virag stated that the dues collection would be a ''monstrous problem'' because changes would be required every time there was a wage increase. Diederich asked who would pay the expense of collecting and disbursing moneys collected pursuant to such a provision; Miller replied ''the Company.'' Diederich replied ''this is a cost item and we are not going to be interested in it.''[49]

The 26th item of the October 7 proposal is:

> *Lost Wages of Negotiating Committee*: during this contract negotiating meetings to be paid for by the company.

Miller stated that the Union was asking for the equivalent of 7 days at 8 hours, or 56 hours, for each member of the negotiating committee. Diederich responded that as long as the Union was paying the employee committee members, he did not see any need for the Company to pay for them also. Diederich added that paying negotiating committee members tends to prolong negotiations because (presumably employee) negotiators would rather negotiate than work.

The 27th item was:

> *Nurse*: to be on duty at all times, especially Saturdays.

Miller stated that this was a demand that the employees had brought up in a union meeting. Miller asked if the Company kept a nurse at the plant on Saturdays; Virag responded negatively, but said that supervisors or guards are trained in first aid.

The 28th item was:

> *Phones*: employees can use phones and Wats line.

Miller stated that he was looking for a continuation of the WATS[50] line policy that Respondent had maintained. Varig stated that employees sign up to come in between 7 and 9 p.m. and are allowed to make 15-minute telephone calls on the WATS line but that Bledsoe, the president of the division, was not aware of the practice and would have it stopped if he found out about it.

Miller stated that the Union also wanted use of the plant telephones for employees during break periods. Virag and Ori stated that the employees are provided free telephones in the cafeteria and were not supposed to use the plant floor telephones for personal calls at any time.

The final item of the Union October 7 proposal was:

> *Term of Contract*: contract to expire on October 31, 1982.

October 31, 1982, was the termination date of the Union's contract with Respondent in Minneapolis. Miller candidly admitted at trial that he sought that termination date so that the Union would have more bargaining power. In discussion of the item Miller stated that the Union was also demanding that any wage increases granted be retroactive to the beginning of negotiations. Diederich replied that the Union should not plan on retroactivity and the Company did not plan to give it because (as well as being expensive) it was just another inducement to prolong negotiations.

Diederich closed the meeting by stating that, since the parties had gone through the Union's October 7 proposal, the Company would review it with its supervisors and get back with the Union later.

Diederich testified, without rebuttal, that as the meeting was closing Miller acknowledged that the intensive examina-

[48] At the time of negotiations the Sioux Falls plant of the John Morrell Meat Packing Co. had a union contract containing a union-security clause designed to conform to South Dakota's ''right to work'' law. Unlike checkoff, Respondent is not alleged to have refused to bargain over such a union-security clause.

[49] Miller stated on direct examination that when Diederich asked how checkoff would work he responded that it would be as checkoff worked in the Minneapolis plant. However, on cross-examination Miller stated that Minneapolis was not mentioned in the November 6 discussion of checkoff.

[50] Wide Area Telephone Service.

tion of the October 7 proposal was an education for the union negotiating members. Miller did not say that the Company had been asking too many questions although at various points members had said that certain questions were ''stupid'' questions. Diederich admitted that some questions were asked more than once but credibly explained that it was an attempt to obtain an understanding of the Union's proposals.[51]

Bargaining Session No. 8; November 18, 1980

At this meeting, and the next, Miller was absent on a previously scheduled vacation. Substituting for Miller was Dennis Painter. At this meeting Diederich presented a series of documents entitled ''Company Counter Proposals'' which, like the Union's initial proposal, were statements of general principles, not specific contract language.

The first item of the Respondent's November 18 proposal was:

> Company reserves the right to make additional counter proposals. All tentative agreements reached conditioned upon reaching agreement on total package.

Painter stated only that the union had no objection but would reserve the same right; Diederich agreed that the Union would.

The first numbered item on Respondent's November 18 proposal was: ''Preamble'' which stated:

> Company and Union to recognize importance of an efficient and productive operation in Sioux Falls as a means of providing job security.

The second item of the November 18 company proposal was ''Recognition'' which stated:

> Company to recognize United Electrical, Radio and Machine Workers (UE) as bargaining agent for employees described in certification. Recognition restricted to present Sioux Falls Plant location.

The parties discussed the recognition clause first. Diederich explained to Painter that the proposal would include the Board certification and stated, ''we will want to describe the bargaining unit as being the plant at the Sioux Falls address.'' In regard to the preamble, Diederich explained that there were 22 microwave oven manufacturers in the world, including three in the United States, with which Respondent was in competition. Diederich stated that the Union had seen what had happened to American industry because of competition from Japanese cars and Japanese electronics: while there were 22 oven manufactures presently existing, within 5 to 8 years there would probably be 8. Diederich stated that if the Company wanted to compete successfully ''it is absolutely essential that you have an efficient operation because those who survive in the future are going to be the most efficient.'' Diederich added that the Company wanted a commitment from the employees and the Union that they would be cognizant of the competitive pressures of the industry and would join in the effort to remain efficient. In making his point, Diederich stated that Respondent had recently lost a large contract simply because it could not compete with the lower prices offered by a competitor. Diederich stated that having such a clause ''would make it easier for the Union to sell it because if the employees read the contract . . . they knew what the situation was that the Company was confronted with.'' Painter replied, ''Well, we will work with you on quality, but that is management's business.''

Painter stated that the Charging Party's position was that Respondent should recognize both the International and the Local. Diederich stated that Respondent's position was that it was not going to recognize the Local as a bargaining agent. Diederich answered numerous arguments by Painter by stating: (1) The stipulation for the election was between the Company and the International; (2) the notices of election which were posted named the International as the prospective bargaining agent, not the Local; (3) the ballot question was whether the employees wanted to be represented by the International; (4) the International had won the election, not the Local; (5) the International was certified, not the Local; (6) the International and the Local, contrary to what Painter was saying, were not the same, especially since one is a large national union with an experienced staff and a significant treasury while the newly created Local was totally inexperienced and not financially responsible; (7) the Company did not want to complicate matters by having an inexperienced Local as a party; (8) contrary to an argument by Painter, the employees at the bargaining table were representing the International and they were not the Union itself; and (9) there was absolutely no evidence that the Local represented anybody because the only authorization card Respondent had seen designated the International Union. Diederich further asked Painter if the Local could bind the International; Painter replied that it could not. Diederich responded that that was precisely the reason Respondent did not want to be dealing with the Local.

The third item of Respondent's proposal was ''No Discrimination,'' which stated:

> Clause unnecessary in areas covered by federal or state statutes, rules and regulations, or executive orders. Company to retain right to restrict hiring of relatives.

In response to questions by the Union, Diederich stated that Miller had said he was proposing a no-discrimination clause simply because it was in another contract and Respondent did not believe in putting things in contracts just to have them there; there was no problem with discrimination at the plant and the Company did not intend to discriminate. Further, the Company had an excellent record and that ''we don't want to be in a position of someone going out and saying, 'Well, we have finally got the Company to stop discriminating' because we haven't discriminated.''

Diederich explained the provision about hiring of relatives by stating that problems were caused when one spouse supervised another, and there were ''favoritism'' complaints about being excused for being late or not having to work overtime or receiving ''dirty'' jobs. Diederich added that this was Respondent's past practice and it wanted to continue to follow it in the future. Diederich said that such a provision would also prevent favoritism allegations where a parent is super-

[51] Accordingly, I shall not discuss further the contention of General Counsel made during the course of the hearing (but not in his brief or closing statement) that Diederich prolonged negotiations by asking too many questions about the Union's proposals.

vising a child. In response to a question Diederich said that, while the proposal only referred to hiring, it would also apply to job bidding and transfers.

The fourth numbered item of the November 18 proposal, was ''Bulletin Board'' which stated:

> Union to provide at its cost a glass-enclosed, locked bulletin board. Company to furnish central location in plant and erect board at that location. Posting to relate to official union business, such as notices, etc. No inflammatory material to be posted. No political material to be posted. No material disparaging Company, its management or supervisor to be posted. H/R [human resources department] to approve material prior to posting Union material restricted to official bulletin board.

In discussing the bulletin board proposal[52] Diederich stated that the Union could have a key and he defined ''disparaging'' for Painter. Diederich stated that ''to approve'' did not mean that the human resources department (Virag) would actually approve it; Respondent just wanted the Union to show any material to Virag before it was actually posted. Dunkleburger asked if the Union could have other places to post; Diederich replied that posting should only be on one union bulletin board. Dunkleburger claimed that the Company was picking up and throwing away material being distributed by the Union in the cafeteria; Diederich responded that antiunion employees were making the same complaint and that Respondent had instructed its supervisors to remain neutral and not pick up either type of literature. Diederich said that Respondent was tired of being in the middle and that, if the Union wanted, Respondent could put up a bulletin board upon which any employee could post anything; Dunkleburger stated that the Union would rather have its own bulletin board. Diederich replied that ''fine, you can have your own bulletin board. You bring it in. We will put it up. You can have a key.''

Before going to another topic, the parties returned to recognition of the Local. Dunkleburger asked if Respondent did not recognize ''us.'' Diederich replied that he did recognize them as representing the International. Dunkleburger asked if Respondent recognized the stewards; Diederich responded that if the International says that they are ''our stewards'' Respondent would recognize them, but a formalized grievance procedure would have to await a complete contract. Painter asked again why the Respondent would not recognize the Local and Diederich repeated several of the reasons listed above. The parties then got into the ''no discrimination'' issue and Diederich again repeated his reasons for the Company's position.

The fifth numbered item of the proposal was ''Seniority.'' It was quite lengthy and need not be quoted here as the colloquy which ensued reflects the positions of the parties. The only portion of the proposal discussed at this session was that regarding probationary period. Employee Eisenhauser asked why Respondent needed a probationary period of 90 working days; Diederich replied that Respondent wanted time to evaluate such matters as attendance and that 90 calendar days would include several weekends. Virag added that 90 working days were needed because employees are moved around through ''training cycles'' and sometimes they do not participate in some training activities until after 30 days are up. Diederich stated that Respondent would be willing to look at 90 calendar days, but was not going to agree to a 30-day probationary period which the Union had proposed. Virag stated that sometimes longer probationary period helped an employee because Respondent could find work which a marginal employee could handle. Painter stated that the Union could agree to extend some probationary periods; Diederich replied that respondent was not interested in needing the Union's consent on the issue of probationary periods.

[52] Before beginning discussion of the bulletin board proposal, the parties had another long argument about recognition of the Local, with the respective positions and arguments being repeated.

Bargaining Session No. 9; November 19, 1980

Painter was again the spokesman for the Union. Diederich first told painter that Respondent had changed dental insurance carriers because the previous carrier had announced a price increase and that the change brought about a smaller required increase. Diederich stated that to pass along the increased cost Respondent was proposing to raise employee-only dental insurance coverage from ''zero to $1.61 per month'' and that for family coverage Respondent was proposing to raise the premium from $4.20 to $5.08 per month, which would be an 80/20 ratio (Respondent paying the greater portion). Diederich further stated that the increase was going to be effective January 1, 1981, and, if agreement was not reached by then, it was Respondent's proposal to put those increased deductions into effect. Painter responded that the Union had a counterproposal; Respondent should pay the increased premium for both dependent and employee-only coverage. Diederich replied that medical and dental costs were increasing nationwide and causing the employees to share the increase would cause them to be more cost conscious.

The parties returned to the Respondent's November 18 proposal on seniority. Diederich said that Respondent, in addition to an up-to-date seniority list every 6 months, would give the Union updates monthly (by the 15th of the month) reflecting new hires and terminations, but Respondent did not want to give complete seniority lists every month as the Union had requested in its October 7 proposal. Painter said the Union wanted three copies of computer printouts on seniority; Diederich replied that the Company would give the Union one and the Union could make its own copies. Diederich responded that he wanted also to negotiate some agreement that mistakes had to be brought to the attention of the Company within a reasonable amount of time.

The parties then discussed Respondent's layoff proposals. Painter stated that the employees needed at least 5 days' notice so they could decide whether to volunteer for layoff. Diederich replied that the Respondent would give as much notice of layoff as it could but, since it received short notice from customers sometimes, it needed flexibility in giving notice of layoffs; Diederich added that the Respondent was ''not proposing'' voluntary layoff. Virag stated that notices of order cancellations were sometimes short; there had been occasions when he had been in the process of hiring people when cancellations were received and he had to send out layoff notices the same day. Painter said that instead of having layoffs Respondent should keep employees working until the market got better; Diederich replied that it was expensive to carry inventory. Employee committee member Jerry Menders

stated that Respondent should keep a large inventory because prices would go up; Diederich replied that the market history of microwave ovens is that prices are going down, not up.

Painter asked what Respondent meant by its proposal to consider qualifications (including ''skill, ability, efficiency, attendance record, experience, potential for future advancement, versatility and attitude'') in cases of layoffs. Diederich explained that Respondent wished to consider qualifications first, then where qualifications were equal the most senior employee would retain the job. Other employees would be placed into a pool where they, in turn, could bump by qualifications into other jobs. Painter argued vociferously stating ''We have got to have strict seniority and minimal qualifications'' for layoffs and that the employees who had been there the longest were the best and had made the most sacrifices to build the plant and were the ''backbone of the plant'' and had put their ''sweat and their blood and their tears into it'' and that the Union ''had'' to have layoffs by seniority with minimum qualifications to fill the jobs. Deiderich responded that in most cases the senior employees would be the better skilled, especially in the lower classifications, but that Respondent did not want to keep marginal employees or those with ''atrocious'' attendance in favor of other, better, employees who may have been hired a few days earlier. Painter and Mark Hubert argued that supervisors would make selections on basis of invalid considerations, such as sex. Diederich replied that Respondent had more confidence in its supervisors.

Diederich told Painter that if employees knew that Respondent would consider efficiency first, it would be an incentive for them to do better because they would know they would get some preference for better work. Deiderich summarized by telling Painter:

> [Seniority] almost is just totally irrelevant. Now, you might have [senior] people who, because they have been here long enough, have those skills, but taken alone, seniority does not contribute to efficiency.

Painter summarized the Union's position by stating that the Union wanted seniority to be the controlling factor among employees who met the minimum requirements, as was done at the Minneapolis plant. To that Diederich responded:

> I don't agree that [it has] worked over there. They use to have 1300 people over there, and now they are down to 350. They use to build all the microwave ovens over there . . . . Now they build all the counter tops over here. We like the labor rates here and we like the ability to be flexible—to manage this plant in a very flexible way, and what you are doing is you are trying to change all that . . . . You're trying to pay the same labor rates [as] in Minneapolis and have the same contractual restrictions that we don't have now. You are trying to make this just like Minneapolis and we don't want to do it. We came [here] because we were attracted by the labor rates, and we came here because we liked the ability to manage this place in a very flexible way, and we want to retain that.

Painter and Diederich repeated their positions several times.

Painter asked why Respondent objected to voluntary layoffs. Diederich replied that voluntary layoffs had not worked in Minneapolis, a fact which he had heard from both Respondent's official Tom Phillips and Union official DeMayo. Diederich, in addition to the reasons he and Virag had previously given Miller, said that Respondent had tried it in Sioux Falls and did not like it; it worked when there were about 100 or 200 employees but now that there were 600 or 700 employees it was unworkable. Painter replied that Respondent had had voluntary layoffs in the past, and the Union wanted Respondent to continue the practice.

Painter said that Respondent was being unreasonable in its proposal that for layoffs of 2 weeks or less, seniority would not be a factor; he stated that a 2-day discretionary layoff was all the Union was proposing. Deiderich replied that there was a ''learning curve'' of about 2 weeks for any job and, under the Union's proposal, Respondent would have to retrain all the senior employees and then have to call other employees back before senior employees learned the jobs they had bumped into. Deiderich acknowledged that 2 weeks was a long period of time for Respondent to have complete discretion on layoffs but it was the same as in the ''Mastic'' (another employer) contract which Painter had negotiated and asked how it could be unreasonable. Painter replied that it was a different plant. Some employees of the union committee stated that there were only 5 days of discretionary layoff in Minneapolis. Diederich replied that Respondent in Sioux Falls did not wish to repeat Minneapolis' mistakes. Painter said that the employees were unhappy about the 2-week proposal. Diederich responded that ''I doubt if you can get 30 or 40 people excited about this.''

The parties discussed the mechanics of recall by mail but no resolution was reached. Diederich did say that Respondent would first attempt to notify employees by telephone.

In regard to Respondent's ''Loss of Seniority'' proposal Painter said that employees should have recall rights for 2 years, not just 6 months. Diederich responded that since it was a young plant 6 months was not unreasonable. In response to a question by Painter, Diederich said that Respondent's proposal that seniority would be lost by accepting full-time employment elsewhere was designed for situations where employees had made a 'conscious decision' to accept full-time permanent employment with another employer and it did not mean that any employee who was on layoff and got temporary work would be terminated. Diederich said that the provision would help out Respondent by getting two employees off of its chargeable unemployment account because one employee who had recall rights would be working permanently for another employer and another employee could be recalled in his place. Painter argued that an employee would be afraid to take employment elsewhere for fear of losing recall rights at Litton and would lose his unemployment compensation if he turned down a job somewhere else. Diederich responded that if another employer refused to hire a laid-off Litton employee the employee was not refusing the job. Painter asked how Respondent would know if an employee had accepted permanent employment elsewhere; Virag responded that his office got calls and reference checks from other employers and it does find out. Painter counterproposed that if an employee notified Respondent in writing that he had accepted permanent employment else-

where he would lose his seniority; Diederich said that he would consider that.

Painter objected to a proposal that seniority would be lost for absence on medical leave of more than 1 year and stated that the Union was proposing 4 months.

Respondent proposed that an employee would lose seniority if he were absent and failed to notify the Company for 1 day unless physically unable to do so. Painter objected that the employee handbook provided for 3 days without calling in before an employee is terminated. Diederich acknowledged that the previous rule had been 3 days, but he stated that if employees know they run risk of being discharged they will call in within 1 day when they are absent. Diederich asked Painter if he could justify someone sitting at home for a day and not calling in; Painter said he could not. Diederich said that supervisors have a great deal of difficulty in deciding how to staff the production lines when they do not know where employees are or if they are coming back. Painter argued that an employee could be in an accident and unable to call; Diederich responded that Painter had not read the proposal and his provision excepted such situation. The parties repeated their positions on this issue several times at this meeting.

Bargaining Session No. 10; December 2, 1980

Miller was present at this session.[53] Miller began discussion of the proposals by stating that he had not thought there would be any problem with the contract language because the Company had a contract in Minneapolis, and he had assumed that the Union would get the same language in Sioux Falls. Diederich replied that the Sioux Falls operation was under a different management and it wanted its own contract. Miller stated that Respondent was attempting to punish the employees because they had joined the Union; Diederich stated that the Company was trying to change some things but denied it was doing so to punish the employees. Diederich referred again to the ''extremely competitive market situation,'' stating that there were 22 manufacturers of 40 brand names, including those coming from Japan; in a few years there would be only eight manufacturers in the business, and only the efficient would survive; and Respondent's objective was to make the Sioux Falls plant the most efficient microwave oven plant ''in the entire world.'' Diederich continued that prior to advent of the Union, Respondent had complete discretion to make any changes in policy that it wished; now it was being asked to sit down and reduce its policies to a legal, binding agreement, and it would not have the right to make changes as it wished anymore. Respondent was therefore making a critical evaluation of all its policies and practices and was deciding what it needed to be one of the survivors in the microwave oven business. Diederich stated that Respondent had accepted the fact that the Union had won the election and the Company had lost it, but Respondent was still attempting to negotiate a contract which would ''give us the best opportunity to be the most efficient operation in the world in terms of making microwave ovens, and we planned on surviving. That is all we are after.''

Miller went to the voluntary layoff issue. He stated it had worked in the past and that the Union wished it to continue; Miller insisted that volunteers should be laid off first; then probationary employees, then least senior employees in the classifications involved. Diederich essentially repeated the answers he had given Painter at the November 19 meeting.

Miller objected to Respondent's proposal to prohibit employees from using plant telephones for personal calls; Diederich replied that the prohibition had always been the rule, and that if any employees had abused the rule in the past Respondent did not intend to tolerate such abuses any longer.

Miller reiterated some of Painter's objections to Respondent's proposals for discretionary layoff for a 2-week period, loss of seniority if an employee was laid off for 6 months or if he accepted full-time employment while on layoff, and Respondent's proposal that employees on sick leave for in an excess of a year would be dropped from the seniority rolls. Miller argued that if employees suffered a job-related injury they should not be dropped at all. Diederich repeated the arguments given to Painter and further replied that if an employee is out for a year he would not be coming back no matter what the cause and that the Company wanted to clear its books in such event.

Diederich and Miller then went to the point to which Diederich and Painter had gotten, shift preferences. Deiderich told Miller that the Company wanted discretion in initial staffing of any second shift in order to select the employees who had the ability to get the shift started and, after that, employees who wished to could bump back to the day shift on the basis of seniority. Miller asked if employees could sign up to go to the second shift on a voluntary basis; Diederich replied that it would be all right if it was understood that the Company had the discretion to make the ultimate decision as to who was transferred because you might have the ''wrong people'' volunteering, and Miller agreed.[54]

Diederich credibly testified that it was after the discussion of shift preference that Miller started going back over more of the ground covered with Painter in the previous two sessions, with Miller essentially repeating the arguments made by Painter on the topics of: loss of seniority if a permanent job is taken while on layoff: failure to return from leave of absence; failure to call in for more than 1 day; 90-working-day probationary period; voluntary layoff; company right to choose who would be laid off for a period of less than 2 weeks; and consideration of qualifications before seniority and layoffs.[55]

Diederich repeated his arguments on all of these topics for Miller. Miller added that a basic objection to the probation-

[53] Miller testified that at the beginning of the meeting he stated that he was surprised that Diederich had not returned with the complete contract proposal. That is, according to Miller, Respondent had promised to come forward with a complete contract proposal even though the Union had not done so. Diederich denied having promised to come back with a complete contract proposal, and I credit his testimony.

[54] Miller testified on direct examination that he first ''proposed,'' then ''suggested,'' that the initial staffing of a second shift be done by volunteers. On cross-examination, when asked what discussion there was on that topic, Miller testified only that he asked why initial staffing of a second or third shift could not be done initially by volunteers. To the extent they differ, I credit Diederich.

[55] Regarding the last-mentioned topic, Miller did suggest that any layoffs outside seniority should be reviewed by the human resources department (Virag), and Diederich agreed. The parties also discussed on this date the fact that the then-existing employee handbook states at one point that layoffs would be in order of seniority and at another point states that layoffs would be by qualifications.

ary period proposal was not only its length but that employees would not receive holiday pay. Diederich responded that holiday pay is compensation which employees should not receive immediately after starting. Miller noted that Respondent had paid holiday pay to probationary employees in the past; Diederich replied that, if that had been the practice, it was nonsensical, and Respondent now intended to change it. Miller invoked the Minneapolis contract which provided 45-day probationary period for evaluation with eligibility for holiday pay after 30 days. Diederich, on the other hand, referred again to the Mastic contract which provided for a 90-day probationary period. Diederich also referred to the contract of the John Morrell Meat Packing Company in Sioux Falls. Diederich noted that at that plant there was no holiday pay for employees until they had been employed 90 days. Miller stated that 90 days would be something the Union could consider as an evaluation period but that it was too long for an employee not to receive holiday pay. Diederich stated that Respondent's proposal would not apply to current employees. Miller responded that the Union would be representing future employees also; Diederich replied that future employees would not be losing anything they never had. Miller then raised again the issue of voluntary layoffs. Diederich and Miller essentially repeated the same arguments that had been made before by Miller, as well as Painter. Miller again raised the issue of whether Respondent would recognize the Local; Diederich gave Miller the same reasons he had given to Painter, and Miller responded with the same arguments made by Painter. In concluding the discussion of that issue, Miller stated that both the International and the Local had to be parties to the contract; Diederich replied, ''Well, we aren't going to do it.'' Miller again raised the issue of voluntary layoffs and telephone usage; Diederich repeated his answers about why the Company opposed voluntary layoffs and further stated that abuses of the rule against personal use of telephones do not a establish a company policy.

Then the parties went to the sixth item of November 18 proposal which was:

> HOURS OF WORK
>
> Regular work week is Monday through Friday. Normal hours will be 7:00–3:30 for some employees and 7:30–4:00 for others.
>
> Company to retain the right to vary starting-quitting times for plant or specific areas after reasonable notice to union.
>
> One 30-minute lunch period, which may be staggered, at times designated by Company. Unpaid.
>
> Two paid 10-minute breaks, which may be staggered at times designated by Company.
>
> Hours of work not guaranteed.

Miller asked if the Company had any intention of changing the usual starting and quitting times; Diederich replied that it did not but that it may in the future because there are other employers in the industrial park in which Respondent is situated; to avoid traffic jams at a bridge which leads to the main highway, the Employer may wish to stagger hours in the future. Miller stated that any change in shift hours should be by mutual agreement. Miller stated that the Union wanted two 15-minute breaks, not two 10-minute breaks, and 5 minutes of washup time. Diederich replied 5 minutes of washup time would cost Respondent $56,000 a year and in the negotiation of any succeeding contract the Union may well want 10 minutes of washup time.

Miller stated that the Union wanted 36 hours of guaranteed work per week; Diederich replied that the Company would not grant that.

The seventh item of the Respondent's November 18 proposal was ''Overtime.'' Respondent proposed premium pay for hours in excess of 8 per day or 40 per week, Saturdays would be paid at double time, and that there would be no pyramiding of overtime. Miller agreed to these provisions but objected to further provisions that Sundays and holidays be paid double time rather than triple time which had been the past practice. Virag stated again that triple time was too expensive; a rate of double time would be to the employee's advantage because Respondent had not worked Sundays and holidays in the past to avoid the expense of triple time pay, so employees would be better off in the long run if the premium were cut to double time.

The overtime provision concluded ''Employees required to work scheduled overtime. Reasonable notice of overtime work to be given.'' Miller stated that the employees wanted voluntary overtime, especially in the fall. McCartin stated he could not operate, especially in the busy season, with voluntary overtime. Miller asked if it would be a problem in periods other than the fall; MaCartin replied that he wanted to continue his practice of bringing back employees to work overtime when there had been employee errors which had caused bad production and created the overtime. There was a discussion about what constituted ''reasonable'' notice of overtime; Diederich ultimately stated that Respondent would give as much notice as it could but customers' orders took preference over any other consideration. Then began a ''chicken-and-egg'' argument with Miller stating that Respondent could produce nothing if it did not have employees and Diederich rejoined that there would be no reason to produce anything (and no jobs) if there were no satisfied customers.

Bargaining Session No. 11 December 3, 1980

At the beginning of this meeting Diederich presented some proposals drafted in formal contract language. It is not necessary to reproduce these proposals at this point as they were essentially repeated when Respondent presented its first plenary contract proposal at the 15th session, January 8, 1981. The topics of the December 3 proposal were an introductory sentence; ''Preamble''; ''Recognition and Definition of Bargaining Unit''; Discrimination''; ''Bulletin Board''; and ''Seniority.'' After a caucus Miller returned and listed several objections[56] to the proposals, to wit: the ''Preamble'' went from six lines in Respondent's preliminary proposal of November 18 to six paragraphs and it was repetitive regarding employees joining or not joining a union it required the Union to provide bulletin boards and limited posting rights; it excluded probationary employees from holiday pay contrary to the handbook; and it left the probationary period at 90 calendar days. Miller had several objections to layoff procedures and the listing of nine factors to be considered be-

[56] Diederich testified that he did not remember Miller's objections to the December 3 proposals; I credit Miller's testimony regarding the objections raised at the December 3 meeting.

fore seniority. After the objections by Miller, the parties went back to the consideration of Respondent's November 18 proposal.

They began at No. 8, ''Call in Pay.'' This was really ''call back'' pay which provided that employees who left work and were called back would receive at least 4 hours' pay. The Union agreed with this proposal.

On Item No. 9, ''Report-in Pay,'' Respondent proposed 4 hours' pay at the employee's regular rate, or 4 hours at the rate of available work, in the event an employee reported for a regularly scheduled shift and there was no work available, but the proposal would not apply if Respondent gave 1 hour's notice to the employee or that there was no work available due to ''act of God.'' Miller stated that the Respondent had a practice of giving some employees 8 hours' pay if all work was canceled because of a ''snow day,'' and 4 hours for other cancellations; Miller argued that Respondent should pay 8 hours pay for all production and maintenance employees in the event of a snow day. Diederich stated that Respondent proposed to leave things as they were rather than pay 90 percent of its employees 8 hours' pay or cut all employees to 4 hours' pay.

The 11th item, ''Funeral Leave,'' was a proposal much more narrow than that suggested by the Union. The parties basically just observed that they were apart on which relatives would count and whether pallbearer pay would be made. Miller credibly testified that he proposed to drop pallbearer pay in the event the Respondent included sisters and brothers-in-law and grandchildren and that Diederich said ''no.''

The 12th item of Respondent's November 18 proposal, ''Holidays,'' provided that probationary employees were excluded; the employee must work the day before and after a holiday; there would be 10 scheduled holidays and one floating holiday designated by the Company each year (which was the past practice); there would be double (not triple) pay for work on holidays; and that ''Saturday and Sunday [holidays], celebrate Friday Monday.'' In discussing this section Miller again stated that probationary employees should get holiday pay and that employees, if excused from working the day before or day after, should get holiday pay and the permission should not be unreasonably withheld. Diederich stated that Respondent was not proposing holiday pay for probationary employees, except that Respondent would ''grandfather'' current employees, and that he did not want to be boxed into language that would appear to require him to excuse employees from working the days before and after a holiday. Miller stated that the Union wanted a second floating holiday; Virag replied that in the area of holiday benefits Respondent was already the most liberal employer in Sioux Falls; Miller stated the Union still wanted triple time for holidays; Diederich responded that the Company was proposing only double time. Miller stated that Saturday-Sunday holidays should be observed on the same days the Federal Government observes them. Diederich said any changes should be discretionary with the Company. Miller stated that any changes in Saturday-Sunday holidays should be made with the consent of the Union; Diederich stated that Respondent was seeking the consent of the Union at this time to change the Saturday-Sunday holiday substitutes without notice.

The 13th item of the Respondent's November 18, 1980 proposal was ''Vacations.'' The principal item discussed in the proposal was the sentence: ''Company to retain right to schedule vacations, including during plant shutdown.'' Miller stated that the employees were opposed to forced vacations during summer shutdowns and wanted to revert to the past practice of ''encouraging'' employees to take their vacation then, but not requiring it. Diederich stated that the Company was reevaluating many of its policies now that it had 700, and not 100, employees. Virag stated that Respondent may want a 2-week shutdown later although Respondent was just proposing a l-week vacation shutdown at this time. McCartin stated that if Respondent used a vacation shutdown, it could use 4 percent less staffing over a year's time and 4 percent of 700 employees is a substantial savings. Virag stated that the employees were told on May 22, 1980, that they would be required to take 1 week of vacation during summer shutdown, and pointed out that in the Union's ''Eye Opener'' of June 12, 1980, the Union had stated to the employees:

> The Company has told the people that next fiscal year we must take our vacations during the summer shutdown. Once we vote the Union, however, this would be one of the issues that the Company must sit down and negotiate with us.

Virag stated that therefore the employees knew what the new policy was, at least since May 22, 1980. Diederich stated that the Mastic contract had a 2-week vacation shutdown period; Miller replied that he was not negotiating for Mastic. Diederich stated that July was a good month to have vacation shutdowns because it is warm and employees' children are out of school. Miller replied that the women in the plant, who made up a majority, have husbands working at other plants and family vacations must be coordinated; Diederich responded that employees of other employers would not determine Respondent's policies. Painter asked why there was a shutdown at all; Virag responded that maintenance had to be done and the conveyors reworked. Virag further commented that it was obvious that employees must save at least 1 week of vacation to cover the vacation shutdowns; McCartin stated that if the vacation shutdown were not during the summer, perhaps it would have to be held in February.[57]

The union committee members stated that the employees had been told that at the end of 5 years they would receive a 1 week's vacation bonus. Diederich responded that while such a provision was in the employee handbook he had been instructed to negotiate that provision out, but he would try to get management to reconsider and ''grandfather'' in those employees who were currently working there. (The plant was not yet 5 years old, so the provision had not applied to any employees then employed.)

Bargaining Session No. 12; December 9, 1980

At the beginning of the meeting Diederich accused the Union of lying when it failed to mentioned in its ''Eye

[57] Miller testified that during the discussion of the vacation shutdown Diederich stated that the Union was taking the selfish position of only 40 employees and that that number was all that the Union spoke for. There is nothing in Miller's notes about such a comment; and Diederich credibly denied this remark attributed to him by Miller.

Opener'' of that date that Respondent had stated that its proposal would grandfather current probationary employees for holiday pay. Miller testified that he would retract such a statement in the ''Eye Opener'' if Diederich would, in fact make that proposal, but Diederich would not reply. On cross-examination Miller stated that Respondent *never* proposed verbally the grandfathering of the current probationary employees. In this, Miller is squarely contradicted by the ''Eye Opener'' of December 12, 1980, which states:

> To clarify one point on the proposal, the Company proposed that probationary employees would not be eligible for holiday pay. They also said that this would not effect [sic] any probationary employees on the payroll at the time of the ratification of our union contract, although we don't have anything in writing to this effect at this time.

Miller is further contradicted by his own notes of the December 9 meeting. Those notes state that Diederich said that the Union should have understood that he had proposed in the sessions of the week before that current probationary employees were to be excepted. Miller testified that Diederich, on December 9, continued to refuse to make such a proposal because he had to get approval from somewhere else; however, his notes do not reflect that Diederich said that he had to get approval before proposing to pay holiday pay for current probationary employees.

Diederich testified that he told Miller that he had an obligation to correct his leaflet which misrepresented the Company's position on grandfathering current probationary employees for holiday pay. Miller stated only that ''we will clarify'' it, but did not say how. Painter accused Diederich of reneging on his agreements so that the Charging Party could not believe anything he said at the table. Diederich asked for an example of how he had reneged; Painter said that the Company's proposal stated that the Company would have a key to a union bulletin board. Diederich replied that he never said that the Company would not have a key to the union bulletin board; Painter had asked if the Union would have a key and Diederich had said yes; nothing had been said about a company key.

The 14th item of the Respondent's November 18 proposal was ''Wages,'' which provided:

> WAGES
>
> Wage policy is to provide rates competitive with firms in area for comparable work.
>
> Establish a minimum and maximum rate for various labor grades: Job classifications to be slotted into appropriate labor grades.
>
> Employee's rate within rate range to be based on variety of factors, including work history, job knowledge, skill, experience, efficiency 90 day review.
>
> Annual increases for all bargaining unit employees, August 1 of each year.
>
> Night shift premium of _____ cents per hour to be negotiated.
>
> For temporary upgrades, get higher rate of pay. For temporary downgrade, get regular rate of pay (unless for convenience of employee).
>
> Group Leader rate . . . 10% over highest-paid person in group being led (not counting Group Leader's rate.)
>
> Group Leaders to implement orders of supervision, assist supervision, make appropriate recommendations to supervision, and do other assignments as directed by supervision.
>
> If a new job created, or existing job substantially changed, parties will discuss new rate. If no agreement, Company establishes rate which is in effect until end of contract.
>
> Temporary vacancies are those based on reason which is temporary in nature. Company can fill by upgrade or downgrade, and may select employee which results in most efficient operation.

Diederich introduced the Company's wage proposal by stating that it was proposing that minimums and maximums for different jobs be established and that employees would generally be hired at the minimum but there might be situations where more had to be paid to attract a skilled employee. After completing 90 days' of probation, employees would receive a 12-cent-an-hour wage increase, then they would get merit increases only except for annual adjustments on August 1 of each year.

As they did repeatedly throughout the negotiations, Miller and Painter asked why Respondent was not proposing to give February 1 increases. Diederich responded:

> When this plant started out, they had a policy that employees would receive increases on August 1. The plant Manager, Mr. Rainey, went to Minneapolis . . . in February—I think, 1977, 1978 and 1979.[58] In each of those years, he went to Minneapolis and got permission to give some of those people part of their August increase in February . . . . It was on an [exceptional] basis that required asking permission and getting approval. It was inconsistent not only with what the policy here was, but with the entire division policy of an annual increase in August, and that the policy was never to give February increases.

Diederich continued that the real policy was only to give August 1 increases and giving February increases to some employees caused problems because some employees got 3 percent in February and others got none; then when August came, the employees who gotten increases in February would get smaller increases than those who had gotten none. Therefore, Respondent received both February and August employee complaints because of what Rainey had done.

Miller told Diederich that Respondent had given wage increases to the unit employees in both February and August for over 3 years and it should continue that practice;[59] that employees always get wage increases when contracts are

[58] It was actually 1978, 1979, and 1980 that February wage increases were given.

[59] At the hearing it was not established just how many employees had gotten wage increases in February 1978, 1979, and 1980, although counsel for Respondent conceded that a majority of the unit employees received February wage increases in each of those years. Respondent adduced testimony as to how it came about that wage increases were made in February of those years. This testimony will be discussed later in the section of this decision dealing with alleged unlawful unilateral actions.

signed, and, when this one was ultimately reached, all wage increases should be retroactive to October 31, 1980.

The parties moved to Respondent's proposal on night-shift premium. Miller stated that the night-shift premium should be 10 percent, or at least continue at the 5-percent premium which was a past practice. Diederich acknowledged that 5 percent was past practice but stated that Respondent wanted to move to a cents-per-hour differential, the amount of which had not been decided. As a reason Diederich stated that ''if we had a night shift that had more people on it, it was going to be a cost item because if you had a percentage, everytime you get an increase, it would put a night shift premium on that.''[60]

In discussing the proposal for group leaders, Miller agreed with Respondent's proposal of a 10-percent premium over the highest paid employee in the group.[61] Miller did not agree that the group leader should recommend discipline or report infractions. Diederich stated that group leaders should report everything that happens on the floor, including matters which may ultimately result in discipline. Diederich added that supervisors would make their own investigation but the recommendation of the group leaders was necessary and an explicit provision for that should be in the contract because the group leaders would be less inclined to perform their duties to report and recommend discipline if it were not.

In regard to the provision for the creation of new jobs, Diederich told Miller that Respondent would notify the Union and discuss wage rates before putting any into effect; if no agreement were reached, Respondent would set the rate unilaterally; thereafter, the wage rate would be in effect for the duration of the contract.[62] Miller told Diederich that new wage rates should be arbitrated if there is no agreement; Diederich replied that Respondent did not want an arbitrator deciding what the wages were going to be. As he testified, Diederich told Miller ''[w]e are in a better position than some college professor'' to determine appropriate wage rates.

During the discussion of wage rates the parties engaged in a debate about what attitude Respondent should take in approaching the issue of what wages should be paid at the Sioux Falls plant. Miller argued that the cost of living had been increasing rapidly; that Respondent should be paying at least $2 per hour more for most classifications; that Respondent should be paying $6 per hour for an assembler, not $3.75 as was then the case; that the Government had stated in some publication that it took a minimum of $20,000 a year to support a family of four; that Respondent was making good profits; that the Union expected to have a wage package retroactive to October 31, 1980; wage progression would have to have automatic raises from a hiring rate; and that a Sioux Falls contract would have to bring the Sioux Falls employees to the Minneapolis rates by the termination of the Minneapolis contract (which would be October 31, 1982).

Diederich then stated Respondent's position on the issue of wage rates; to paraphrase Diederich: Respondent would ''provide competitive wages for comparable work,'' and it would pay no more. It makes no more sense for Respondent to pay more for labor than it has to, anymore than it would make sense for an individual to pay more for groceries than he has to. Respondent can hire all the labor it wants in the Sioux Falls area at the rates it was then offering; in fact, Respondent then had on file thousands of applications for employment at that plant. Even when Respondent had not advertised for jobs, as many as 1600 people had come to apply for jobs when Respondent was going through its seasonal hiring phase. Respondent would not pay $6 an hour when it could get all the employees it needed at $3.75. Respondent would not base its wage rates on the cost of living or what some government publication says employees need. Respondent would pay more if it had to; the thing for the Union to do was to go out and organize other businesses in the area and drive up the area wage rates if it wanted more money for the employees at Respondent's plant. Diederich further told Miller that perhaps Respondent should tell new hires that the wages paid are not sufficient for a head of a household and Respondent was not basing its rates on profits but on the Sioux Falls labor market conditions.

In sum, Respondent was taking a strict supply-and-demand position on wages. The labor market in Sioux Falls was very loose; it was a time of high unemployment; and Respondent was satisfied with a quality of the employees it was attracting at the labor rates it was then paying and saw no reason to pay any more than it had to. Diederich repeated this basis for Respondent's position on wages numerous times throughout the course of negotiation.

The 15th item of Respondent's November 18 proposal was that its current sick day program be eliminated and that Respondent would ''offset elimination of such days by other improvements.'' At the time Respondent had a policy of paying employees up to 12 sick days per year at 100 percent;[63] 80 percent for the 13th through 65th day; 60 percent from the 66th through 130th day, as mentioned earlier. Diederich gave Miller the reasons for proposing to eliminate the sick day program: He stated that the program was a problem because employees, when being considered for merit wage increases, would receive less if they had bad absentee records and employees would respond that ''you paid me to be absent.'' Some employees were taking advantage of the situation and using sick days for activities such as skiing and this created morale problems for employees who were not abusing the program. Diederich stated that, during the preceding 12 months, the cost of the sick day program was a $138,000. He further stated that Respondent intended to propose a ''Sickness and Accident'' program[64] similar to the one existing in Minneapolis where employees had a waiting period of 3 days for illnesses, but none for accidents. Thereafter they would receive so many dollars per week because of their disability. In return, Respondent would put the money it was saving in other benefits for the employees.

Miller responded that the Union not only wanted to keep the sick day program, but wanted Respondent to pay for all

[60] The transcript, p. 9453, L. 24 and p. 9454, L. 1, is corrected to read ''5 percent'' rather than ''15 cent.''

[61] This was the past practice, and Miller's early agreement erodes the premise from Charging Party's contention (p. 77 of its brief) that Respondent's position was ''economically regressive'' and taken in bad faith. therefore the matter will not be discussed further.

[62] I discredit Miller's testimony that Diederich stated that if a job is created Respondent would set a rate for the contract's duration and would not bargain on the issue.

[63] An employee employed in January would have 100-percent pay for 12 sick days per year; if hired in February, he would have 11, etc. According to the testimony of Virag an employee hired in December would have 1 sick day per year, but that as of January 1 the employee would, as all other employees on payroll in January, have 12.

[64] The parties often referred to this as the ''A&S or ''S&A'' program.

unused sick days. Virag stated that Respondent had never paid unused sick days and did not intend to do so. Diederich added that Miller was, in effect, proposing 12 more holidays.

The 16th item of the November 18 proposal was ''Sickness and Accident,'' which stated:

> Continue present plan. Sick days eliminated in favor of other improvements. Continue present long-term disability plan at employees' option.

Diederich explained that ''continue present plan'' should not have been there; Respondent was proposing to eliminate sick days altogether as previously discussed.

The 17th item, ''Health Insurance, Dental and Vision Care,'' caused little discussion at this meeting. Diederich stated that Respondent was proposing to keep the right to change insurance carriers as long as the coverage of the employees remained equivalent. He stated that Respondent was proposing to continue to pass along increases in the cost of family medical insurance on the same basis as before: 76 percent paid for by the Employer and 24 percent by the employees. Diederich further proposed that dental insurance premiums would remain at 80 percent paid for by the employer, 20 percent by the Employee for family coverage. Diederich further told Miller that he had told Painter that increases in dental insurance premiums were coming due on January 1 and that the increases, unless something else was negotiated, would be to raise employee only coverage from ''zero to $1.61,'' and for dependent coverage to $5.08 per month (from $4.20). Miller replied that the Union's position was that Respondent should pay all increases in the medical and dental premiums and that employees should not share in the cost of employee-only coverage.

Miller, without contradiction, testified that he responded to Diederich that the Union had opposed increases to employees in insurance premiums before, and it opposed them now. He further testified that he asked Diederich why Respondent had not passed the health insurance increases along at the time they had gone up (August), and Diederich replied: ''It would not have been a very good time to do it.'' Agreement was never reached on the issue of health insurance premium increases.

The 18th item of Respondent's November 18 proposal was ''Life Insurance.'' Diederich stated that the Company was proposing to continue the present program, but any cost of increased premiums would be shared by the employees. Miller stated that the Company should pay any increases in premiums.

The 19th item of the proposal was:

> SUPERVISORS:
>
> Supervisors and others may perform work which has traditionally been performed by them in the past, including training, instruction, testing runs, emergency work, helping out to enhance efficiency of operation or meet production schedules.

Miller stated that testing, instruction, and emergency work were permissible, but not to maintain production schedules or enhance efficiency. Diederich replied that supervisors' working sometimes helps employees through the ''learning curve'' and that Respondent did not intend to displace employees. Miller told Diederich that a statement should be added that the function of supervisors was to supervise and not to do bargaining unit work. Diederich replied that he would work on language to that effect.

The parties then discussed Respondent's 20th proposal, which was ''Leaves of Absence.'' Diederich told Miller that Respondent wanted to grant leave at its own discretion. There was some discussion about accrual of seniority during a leave of absence and the reasons for which leave may be granted, but no major issues were drawn at this point. There was some repetition of the positions taken when the Union advanced its leave-of-absence proposal at an earlier session.

At some point in this meeting of December 9, Miller brought up the topic of buzzers. He produced a copy of a December 5 memo from McCartin to all plant personnel. The memo states that a ''new plant timing system'' would be put into effect on December 8 and that a ''tone'' would be used to announce shift start, morning break, lunchbreak, afternoon break, and shift stop. Miller complained, not about the installation of the buzzers, but about the fact that the schedule announced by McCartin's memo reflected only 10 minutes for breaktime and allowed no time for walking between the work areas and the cafeteria. Diederich responded that the breaks had always been 10 minutes and the buzzers were there to stay.[65]

Bargaining Session No. 13; December 10, 1980

The parties began with a discussion of the 21st item of Respondent's November 18 proposal, ''Military Leave.'' Respondent proposed granting 2 weeks' leave for National Guard duty and paying the difference between the affected employees' wage levels and what employees received from the military. Miller asked Diederich to put in Respondent's proposal that it would comply with the Universal Military Training Act. Diederich agreed. When discussing military leave Miller pointed out that Diederich had made no provision for union leaves of absence. Diederich responded that Respondent was not proposing union leaves of absence because Respondent did not want to appear to be favoring the Union.

The 22d item of Respondent's November 18, 1980 proposal was ''Job Posting.'' The bidding and posting procedures were probably the most complex issue discussed by the parties. The previous discussions noted herein adequately reflect the basic position of the parties.[66] Ultimately an agreement was reached on this issue and neither General Counsel nor Charging Party contends that Respondent's bargaining on the job posting and bidding procedures was in bad faith. Therefore, it would serve no purpose to relate all the exchanges over this topic between the parties during these extensive negotiations. It suffices to state here that to what extent there were disputes in the testimony between Diederich and Miller, I credit Diederich, and I find and conclude that there is no evidence that Respondent bargained in bad faith

[65] This paragraph is in accordance with the testimony of Miller; Diederich testified he remembered no discussion of the buzzer system on December 9.

[66] Throughout negotiations Respondent took the position, consistent with its positions elsewhere, that in job-bidding qualifications would be the primary consideration and seniority would be considered only if qualifications between applicants were equal. Consistent with this undisputed fact, I correct the record, p. 9617, L. 6, to change ''would be controlling'' to ''would not be controlling.

over the topic of job bidding and posting throughout negotiations.

Item 23 of Respondent's November 18 proposal was ''discipline and discharge which stated:

> Company can discipline or discharge for just cause, including violation of contract and of reasonable work rules. Parties to agree attached work rules are reasonable. Company to provide a ''no-fault'' absentee control program, designed to improve attendance by means of warnings, suspensions and terminations, if necessary.
>
> Probationary employees can be terminated without recourse to contract.
>
> If employee requests steward at investigatory meeting, Company will allow or terminate meeting and conclude investigation without interviewing employee. If handing out discipline already decided upon, no steward required.

Diederich began the discussion by stating that the only matter upon which the parties appeared to be apart was about taking disciplinary notices out of employees' files. Miller responded in most emphatic terms there were more disagreements than that. Miller stated that ''we are not negotiating work rules.'' Diederich replied, ''Well, Joe, I don't think you mean what you're saying but I hear what you're saying.'' Then the parties went on to the next topic, probationary employees. This consisted only in changing ''recourse to the contract'' to ''recourse to grievance procedure'' upon the suggestion of Miller. Miller made no other objections to the reference to probationary employees.

Miller asked Diederich to explain the reference to ''investigatory meeting.'' Diederich essentially repeated what the provision states above in summary fashion; Respondent was proposing to grant *Weingarten*[67] rights and no more.

Miller noted that Diederich had not proposed removal of warning notices for any reason. Diederich responded that it did not make sense to remove warning notices of an employee who is on the verge of being fired just because a contract had been signed or because 6 months had elapsed.

Respondent's proposal on discipline and discharge concluded with a recitation that certain rules were reasonable. Following that there was a listing of two types of violations, 24 type ''A'' rules which would result in immediate discharge and 9 type ''B'' rules which would result in warning, then suspension, then discharge for repeated offenses. Diederich testified that he told Miller that he wanted to discuss the proposed work rules and that he was repeatedly rebuffed by Miller who stated that the Charging Party would not be negotiating work rules.

The 24th item of Respondent's November 18 proposal was ''Health and Safety.'' The discussions about this item at this and some succeeding sessions were complex and extensive. Since neither General Counsel nor Charging Party contends Respondent bargained in bad faith over the issue of health and safety, it is unnecessary to detail all of the negotiations on this point. The only significant portion of the discussions on this item was on a proposed work rule which stated: ''filing claim under workers' compensation for nonwork-related injury [is] grounds for dismissal.'' Miller did discuss this work rule to the extent that he stated that such falsification may be grounds for discipline, but not necessarily discharge. It is further significant that during the negotiations on this point Miller noted that, under South Dakota unemployment compensation law, employees received no workers' compensation for the first 6 days of disability caused by a work-related injury unless they are disabled for a seventh day. Miller stated that the Company should pay for those 6 days. Diederich responded that Respondent was not proposing to pay for those 6 days because it was a cost item.

There were seven enumerated ''Health and Safety Rules'' incorporated in Respondent's proposal on health and safety. They included prohibitions against failure to wear safety glasses, smoking in prohibited areas, horseplay, etc. The section did not state a form of discipline for breaches of these rules, but Miller commented these were nevertheless work rules and he would not discuss them.

The parties then proceeded to discussion of item 25 ''Grievance Procedure,'' which provided:[68]

> *Grievance Procedure*
>
> Four-step grievance procedure:
>
> 1st - Employee and supervisor
> 2d - Steward and supervisor
> 3d - Chief Steward and superintendent
> 4th - UE representative and H/R representative.
>
> All steps documented on single written form.
>
> Grievance to be initiated within 3 working days of incident
>
> Movement to higher steps and responses to be within 3 working days. If not moved timely, grievance dropped. If reply not timely, automatically moves next step.
>
> Form to identify employee, date of incident, nature of grievance, contract provision violated and remedy sought. Form restricts grievance to matters raised thereon.
>
> No Decision on Arbitration.
>
> Grievance investigations and meetings at end of shift, without pay.

Diederich began the discussion by stating that, as the outline reflected: Respondent wanted a speedy and streamlined grievance procedure with the fewest number of people involved; Respondent did not want to pay for time spent in grievances; Respondent wanted some statement that the problems would be discussed with the supervisor first because that is the way grievances often get resolved; quickly and the contract provision involved, as well as the nature of the grievance, should be stated on the face of the grievance because Respondent could be incurring liability while it was considering grievances under the wrong section. Diederich stated that one reason for Respondent's proposal was that 80 to 85 percent of the employees had never worked anywhere else before and many of them were young persons just out of high school; this being the case, they had a tendency to treat every annoyance or inconvenience as a grievance and Respondent did not want to be hit with a ''clutch of griev-

[67] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[68] Miller placed this discussion of the company proposal on grievance procedure in the December 11 meeting. It makes no substantive difference whether it occurred at December 10 or 11, 1980; however, to the extent they differ on the question of when these exchanges took place, I credit Diederich.

ances.'' Miller stated that the Union was not there to file frivolous grievances; Diederich responded that Miller had already stated that the Union was concerned about being sued for failure to process grievances; therefore, the Union would not be interested in limiting the number of grievances.

Miller reiterated the Union's positions on grievance procedures which he had stated before: the first step should be between the employee, area steward, and the supervisor. Miller argued that the contract section involved could not always be identified at early stages because employees and stewards do not always know the contract well enough; also they could be grieving over past practices. Miller stated that the Union would agree to identify grievances in later steps of the grievance procedure. Miller further stated that Respondent's fourth-step proposal could not be agreed to because it was against the union constitution for a union representative to meet alone with a company representative to resolve grievances. Miller noted that the Union was still proposing that chief steward be allowed free use of the telephones to discuss union business; Diederich replied that Respondent could not allow the chief steward to spend whatever time he wanted to on the telephone as there was no way that it could monitor whether he was talking about union business.

Diederich stated that ''No Decision on Arbitration'' meant that Dolen had not made a decision on whether to agree to arbitration. Miller asked what the alternative would be; Diederich replied the Union would have a right to strike. Miller stated that the Union had some contracts which gave it the option of striking or demanding arbitration; Diederich replied that he was aware of that fact. While discussing Respondent's grievance procedure proposal, Miller reasserted his request that the Respondent agree to a regular second-step meeting and monthly third-step meeting. Diederich responded that the Employer did not want to be held waiting for grievance meetings especially when there was potential backpay mounting. He added that perhaps in specific cases Miller might call Virag and work something out. Miller again asserted that he wanted more representatives of the Union than the chief steward at the third step which would involve the superintendent. Diederich replied that there was no point in having five people to discuss a grievance; there was no need to have both the department and the chief steward present; the two of them could consult between the second and third meeting to ''get all their ducks in a row'' before the meeting. In summary, Diederich told Miller the employer did not want to pay for lost time or lost production because of employees attending grievance meetings. Miller argued that grievances should be processed on working time.

Bargaining Session No. 14; December 11, 1980

The 26th item of Respondent's November 18, 1980 proposal was ''Layoff Deferment'' which provided: ''No preference for layoff because of union activity, position or status.'' This item was passed with a comment by Miller that it was obvious that the Company was not proposing any type of layoff deferment (or superseniority).

The 27th item of the proposal ''UE Representative'' which provided: ''By mutual arrangement, plant tour arranged after end of shift.''

On direct examination Miller testified that he told Diederich that he did not understand the Company's proposal because he was asking for the right to come into the plant to investigate grievances and conduct meetings and that the tour was a separate question.

According to Miller:

> Mr. Diederich said that they might be willing to work out something on the plant visitation after we get a contract. I asked again if I could have a plant tour so I could look at the jobs that are in the plant, to study different jobs. Mr. Diederich said that he did not feel it was necessary . . . .

On cross-examination Miller first said that Diederich gave him a flat ''no'' to his request for a tour; then Miller changed his testimony to state that Diederich did not say ''no'' but apparently had meant that because Diederich began talking about disruptions if a tour were to take place. Further on cross-examination Miller testified that he had previously asked for a plant tour on October 15 and October 23 or 24. He did not testify about tours when testifying about the October 23 or 24 sessions, and his notes do not reflect any such request on either date. Diederich testified on the issue that in discussing the ''U'' Representative'' proposal he stated to Miller that he wanted to make clear that the union represenatives could not just drop by the plant anytime they wished and Miller agreed that appointments would be made through Virag. Further according to Diederich:

> Mr. Miller then said that some time when it was convenient he would like to come in and see the plant in operation and could we work something out. I said to Mr. Miller I thought we could but I could see we might have some disruptions because we had seen some evidence of it and I wanted to impress on him that it was up to him to take steps to control it. He said that he would try but that he could not guarantee it because the people would be very emotional when he came into the plant.

Diederich flatly denied stating to Miller that a tour was not necessary or that it would be arranged only after a contract was signed. Respondent called Ori and Virag in support of its position. Ori testified ''Joe said that he'd like to have a tour of the plant when [sic], with himself and Denis Painter and the President of the Union.'' Virag testified: ''Joe then made a comment and said sometime when it is convenient, I would like to have a tour of the plant to see it in operation, and I would like to have myself, Denis Painter, Carrie Dickens and Chuck Eisenhauer in attendance.'' Both Ori and Virag denied that Diederich stated that a tour could be arranged only after a contract was signed or that it was not necessary.

In addition to Ori's not completing the phrase starting with ''when'' in quoting Miller, both Ori and Virag testifed that Diederich stated nothing in response to Miller's statement that he would like to have a tour of the plant.

While the testimonies of Ori and Virag are not entirely congruent with that of Diederich, I find that they do support Diederich's testimony sufficiently to credit Diederich over Miller, especially in view of the above-outlined inconsistencies in Miller's testimony on this issue, as well as many others. Accordingly, I find that the exchange on the issue of plant tour occurred as related by Diederich and quoted above.

In response to the Union's proposal for checkoff Respondent proposed as item 28 of its November 18, 1980 proposal:

DUES CHECK-OFF

> No union business to be conducted during working time. Violation is grounds for dismissal.

Miller asked what Diederich meant by that, and Diederich replied with Respondent's reasons for not granting checkoff; as Diederich testified:

> I said, ''What it means is that we are not proposing to have a dues checkoff provision; that as far as we were concerned that was union business; that there was an administrative cost involved; that there was a cost involved in originally setting up the checkoff system for this plant; there would be a maintenance cost; that as employees came and went, there would be a maintenance cost, that as dues changed, there would be a maintenance cost because we would have to make changes if the amount of the dues changed; there would be changes because rates varied; people got increases, the amount of dues deducted would have to be changed and there was a maintenance cost; that we weren't prepared to do it.''
>
> I also said that people have a tendency to look at their net pay. I said ''You know, we have people who they have deductions for charities, credit unions, saving bonds and things like that in plants that I have been [in] and they tend to look at their net pay and they forget they have those things. That's another reason.'' And I said, ''Another reason was that the union had already made several allegations that we have taken discriminatory actions, fired people, done other things to people because of their union activity and we frankly don't want to know about it.''

Diederich further told Miller that the basis for the proposal as drafted was that, if there was to be no checkoff, he assumed that the Union's stewards would be attempting to collect dues from employees and Respondent did not want that activity occurring during working time.

The 29th item of Respondent's Novmeber 18, 1980 proposal was that ''Wages of Negotiating Committee'' would be paid by the Union. Miller stated that the Union still was insisting on 56 hours of paid time for the union committee members and that the negotiations were taking a long time. Diederich responded that they were taking a long time because the Union brought in statements of general principles and the Respondent had done that also and there had been no complaint from Miller: and he (Diederich) did not consider that there had been a waste of time because the positions of the parties needed to be explored. Miller argued that many of the Company's proposals had not been mentioned when the parties were discussing the Union's proposals. Diederich responded the Company was not limited to the topics selected by the Union.

The 30th item of Respondent's proposal was that timeclocks be instituted. Diederich stated that the Employer wanted timeclocks because employees were abusing their break and quitting times. Miller replied that Respondent could put the clocks in but the Union was not going to agree to it and did not want any mention of timeclocks in the contract.

The 31st item of Respondent's proposal was ''Telephones,'' which stated that the plant-floor telephones were not to be used for personal reasons; personal calls were to be made at break and lunch periods from telephones in the cafeteria; and that WATS lines usage was to be curtailed. In reviewing the proposal Miller stated that the employees had always used plant-floor telephones before; Diederich responded to that while some employees may have gotten away with it, abuses do not establish policy and that employees were only to use the cafeteria telephones for personal business. As Virag had stated in the November 6 session, Diederich further stated that the WATS line usage may have to be curtailed because the division president, Bledsoe, did not know about the practice and would be upset if he did. Diederich added that, in any event, Respondent was looking for a new type of long-distance telephone system for reasons of economy.

The 32d item of Respondent's November 18 proposal was ''Overtime'' which simply stated that employees would be required to work scheduled overtime. This item was passed with the observation by Miller that employees still wanted voluntary overtime. Diederich replied that McCartin could not operate the plant without compulsory overtime.

The 33d item of Respondent's November 18, 1980 proposal was ''Zipper Clause,'' which provided:

> Wavier of right to negotiate over any subject or item not covered in agreement. Acknowledges no agreements or practices not spelled out in the agreement.

Diederich stated that Dolen and McCartin were the new managers; it was not Joe Rainey anymore, and that Respondent did not intend to be bound by everything that Rainey had done. Therefore Respondent wanted a provision that stated that everything the Union wanted is in the contract and that if the Union wanted anything else in the contact it should be sure to get it in writing because there were to be no side agreements or invocations of ''past practices.'' Miller responded that he would agree to that if Respondent would agree to a clause stating that all previously granted benefits were retained. Diederich replied that such a position was totally inconsistent with his and that Respondent not only wanted a provision that would keep the Union from invoking past practices of ''good old Joe Rainey,'' but that Respondent further wanted a provision that says that both parties had had an ample opportunity to negotiate and had waived the right to negotiate over anything that is not covered in the agreement. Miller stated that he did not know why Respondent would need that because it already had everything that it could possibly dream of in the proposals anyway; Diederich responded that if that was the case the Union should not have any trouble about agreeing to Respondent's zipper clause. Diederich further stated that the Respondent would also be content with the zipper clause contained in the Mastic contract negotiated by Denis Painter; Miller replied that the Union was not negotiating with Mastic.

The 34th item of the Respondent's November 18 proposal was ''Management's Rights Clause'' which provided:

> General clause reserving all management rights not abridged or restricted by contract. Specific items spelled out, without limiting general management's rights. Includes right to determine products, method of produc-

> tion, rate of production, to lay off, subcontract, eliminate product lines, determine where work is to be performed, shutdown or transfer work or operations, for example.

Diederich stated that Respondent wanted a two-part provision on management rights, one part being a general statement of principles and the next being a specific listing of the rights retained by management. Miller responded that such a clause did not belong in a labor contract; that the Union had negotiated a few over the years but the UE did not then negotiate them; Respondent had these rights anyway and there was no use in putting them into a contract. Diederich replied that if management already had the rights then there should be no objection to putting it in the contract. Miller further argued that if the Company had the mangaement-rights clause it did not need the zipper clause as the two were redundant. Diederich stated that Respondent would also take the Mastic contract's management-rights provision; Miller again replied that he was not negotiating with Mastic.

The 35th item of Respondent's November 18, 1980 proposal was ''Productivity'' which provided:

> Clause confirming right of company to institute automation, mechanization, combination of jobs, changing jobs and improving machinery or equipment, changing work methods or procedures or [sic] industrial engineering in order to improve productivity.

Diederich told Miller that, as he had previously explained to Painter when discussing the ''Preamble'' proposal, Respondent was in a highly competitive business and the only way to compete with the Japanese and others was to get a ''commitment from the union and employees that we are going to have a joint effort here to increase productivity through such things as automation, mechanization, and industrial engineering.'' Miller responded that there was no ''joint effort'' and that the clause was management's business and did not belong in a contract. Miller repeated that the clause was redundant with the management-rights clause; Diederich responded: ''I don't think they are repetitious at all. Management's rights defined what our management rights are and this is a commitment by everyone involved that we are all going to try to cooperate and achieve a highly productive plant through various methods.'' Virag stated that there was a ''new era''; that people are going to have to change the way they think or be left behind by other industrial countries which are becoming more productive. McCartin pointed out that he had worked in the television industry and that everyone had seen what had happened in terms of foreign competition; one cannot buy a color television set that is made in the United States.

The 36th item of Respondent's November 18, 1980 proposal was ''No Strike, No Lockout'' which stated in general terms that there would be no strikes during the contract term. There was essentially no discussion on this issue at this time, and later Respondent dropped this proposal as it was not agreeing to compulsory arbitration.

The 37th item of the proposal was ''Term of Contract,'' which provided that the contract would be for a period of 1 year from the effective date and that there would be no wage retroactivity. In discussing this section Miller stated that the Union still wanted all wage increases negotiated to be retroactive to October 31, 1980; Diederich replied that Respondent was not proposing retroactivity. Miller stated that the employees wanted the same termination date as that of the Minneapolis contract, October 31, 1982. Diederich stated he found it hard to believe that the employees had originated such idea, but that, in any event, Respondent was not agreeing to have the same termination date as that in Minneapolis.

In discussing retroactivity Painter indicated that the employees were looking for a February increase. Diederich replied that Respondent was not proposing a February increase; Respondent was proposing that it go back to the idea in effect when the plant was originally started, that there be only one increase, in August, and that the only reason for the prior February increases was that ''Joe Rainey was the guy who went over there [Minneapolis] and got permission to advance part of the August increases''; therefore Respondent was not proposing any February increases.

Bargaining Session No. 15; January 8, 1981

At this meeting the parties exchanged plenary proposals. The Union caucused and returned with Miller again stating that the Company had proposed many things beyond any prior discussions; Diederich responded that the Company was not prevented from making additional proposals. Miller stated that the Union wished to negotiate from its proposals; Diederich replied that the Union had asked the Company for a complete proposal, but he would agree to work from the Union's proposal.[69]

The parties went into the Union's proposal (received in evidence as G.C. Exhs. 28(a)–28(w)), and Diederich first observed that, aside from having the Company's name wrong, the Union's proposals still included recognition of the Local, a concession the Company was not willing to make and he repeated the reasons again. Miller repeated his arguments; Diederich repeated Respondent's position again.

The second item of the Union's January 8, 1981 proposal, ''Recognition and Bargaining Unit,'' stated that Respondent would recognize ''the Union'' as representative of Respondent's employees ''at its plant in Sioux Falls, South Dakota.'' Diederich stated that Respondent wished to have the address of the current plant included because other Sioux Falls plants may be opened later and they would not necessarily be a part of the Board-certified bargaining unit. Miller argued that any future Sioux Falls plants should be included in the bargaining unit; Diederich repeated himself. Diederich also stated that the words ''the Union'' could not be used because it might be miscontrued to include the local. Diederich again repeated his reasons for this position when questioned by Miller.

The third item of the proposal was ''Discrimination.'' Diederich stated that if, as the Union stated, there were no problems with discrimination because of race, color, or political or religious affiliation, there was no point in having a clause prohibiting it in the contract; the Union should not be able to announce to anyone that it had gotten Respondent to ''stop'' discriminating against anyone; Respondent posted the appropriate notices regarding the laws against racial discrimination; there was no point in putting such a clause in the contract because no more than 40 employees would read the

[69] The Union's January 8, 1981 proposal will be stated here in summary fashion as the parties thereafter worked mostly from Respondent's proposals.

contract; the Union should not be able to have two chances to complain about discrimination (by grievance and complaint to the Equal Employment Opportunity Commission). Diederich further objected to a clause included by the Union that there would be no discrimination against the hiring of relatives; Diederich repeated Respondent's reasons given Miller earlier.

The fourth item was ''Bulletin Boards,'' which stated that the Company would provide bulletin boards and the Union was to approve all notices posted thereupon. Diederich stated that he had previously told the Union that Respondent would not pay for bulletin boards, and that all postings should be shown to Virag before posting. In response to an argument, Diederich again stated that at one time the Company had proposed that the Union could have a key to a bulletin board but he never said that the Company was not going to have a key and the Company would want to have a key to any bulletin boards.

On the fifth item of the Union's proposal, ''Seniority,'' Diederich made the following objections: For employees hired on the same day, it was arbitrary to list them ''A'' to ''Z'' in even-numbered years and ''Z'' to ''A'' in odd-numbered years, as the Union proposed; the employees should be ranked in order of acceptance of employment. The Company would agree that if probationary employees were laid off, they would be recalled before new-hires and their past service would count toward completion of their seniority period. The probationary period should be 90 days, not 30. The Company would give seniority lists every 6 months, not 6 months or more often at the Union's request, as the Union's proposal had stated. In regard to a loss of seniority provision, Diederich agreed that discharge for cause or voluntary quit would terminate seniority, but Diederich stated that seniority should be retained only for 6 months while on layoff, not 2 years as the Union proposed. Respondent would agree that failure to return from leave of absence, failure to return from layoff, and acceptance of full-time employment while on leave of absence, would terminate seniority. Diederich said he would respond later to the union proposal that seniority would terminate after 12 months of medical leave but would be unlimited if on a worker's compensation injury. Diederich disagreed with a union proposal that an employee be allowed 3 consecutive working days without notifying the Company of why. Diederich again stated that it was unreasonable to allow that much time, even though, as he acknowledged, such a provision had been in the employee handbook. He added that Respondent would go from 1 day to 2 (as in the Mastic contract) but would go no further because employees should certainly be able to call in within 2 days. Diederich asked Miller if he could justify an employee failing to call in for 2 days; Miller could not but still insisted that the 3-day provision in the handbook be retained.

The sixth and seventh items of the Union's January 8 proposal were ''Layoffs'' and ''Recall.'' Diederich objected to a provision that 2 days, not 2 weeks, would constitute a period of layoffs for which the Company could retain or call back from layoffs employees at its discretion, without regard to seniority. Diederich further objected to a provision that volunteers be laid off first; he repeated Respondent's reasons stated in previous sessions. Miller and Diederich argued again about the fact that the employee handbook stated in one place that layoffs would be by departmental seniority and in another place that layoff would be by seniority only if qualifications of employees are equal. Diederich further stated that Union's proposal essentially provided that layoffs and recalls would be by seniority; Respondent wanted to increase efficiency; therefore, Respondent would propose that such selections be basically on merit and seniority would apply only in event that employees did have equal qualifications. In discussing seniority, Diederich stated that the Company would agree that if a senior employee were laid off in favor of a junior employee, the situation would be reviewed by Respondent's human resources department.

The eighth and ninth items of Union's proposal were ''Shift Preferences'' and ''Inventory'' which dealt with the staffing of new shifts and the taking of vacations during inventory (as opposed to summer vacation) shutdowns. There was essentially no discussion of these items.

In discussing tha 10th item of the Union's proposal, ''Hours of Work,'' Diederich stated that the Union appeared to be proposing that all changes in the shift hours be agreed upon. Miller replied that this was the Union's intent. Diederich stated Respondent would notify the Union of changes but did not want to be in a situation where the Union could veto a management decision on the issue. Miller said again that any changes would have to be with the Union's consent; Diederich responded, as he had done before, that Respondent was then seeking to get the Union's consent at that time for the right to change shift hours. Diederich again stated that Respondent needed this right because as the industrial park in which Respondent was located grew, the employers in the area would need to be able to change their shifts to avoid traffic jams because all traffic had to exit over one bridge.

Diederich further objected to the ''Hours of Work'' provision that stated that there would be two 15-minute breaks and one 5-minute washup period each day; Diederich stated that Respondent would not be agreeing to either. However, he added, he would speak to Dolen about the possibility of off-setting the loss of sick days with increased break periods.

In discussing the 11th item, ''Overtime,'' Diederich objected to a union proposal that employees had the right to decline overtime that triple time be paid for holidays, that notice of Saturday overtime would have to be given by Wednesday and that weekday overtime would have to be scheduled by noon of the preceding day. Diederich stated that Respondent was proposing that Saturday overtime would not have to be scheduled until noon Thursday and that there should be an exceptions when the Company could not give notice of overtime because of emergencies.

The 12th item, ''Call in Pay,'' was passed without much discussion other than an observation by Diederich that the parties appeared to be in basic agreement regarding pay when employees are called back to work after they have left for the day.

Bargaining Session No. 16; January 9, 1981

The parties continued with the Union's January 8 proposal. The 13th item ''Report-in Pay'' was discussed briefly. Miller stated that under his proposal employees would get 4 hours' reporting pay unless they got 2 hours' notice that a shift would not be conducted; Miller added that this was a modification of the Union's previous proposal which was for 12 hours' notice of shift cancellation. Diederich replied that he

had talked to Ori and that all employees lived within 1 hour's driving distance and that Respondent was therefore proposing that there would be no report-in pay if there was 1 hour's notice over a local radio station that a shift would not be conducted. The parties again discussed snow days. They maintained their previous positions, the Union wanting 8 hours' pay for all employees: Diederich stated that the Respondent would extend the 8 hours' pay to no more employees that those who already received it.

The 14th item, ''Jury Duty Pay'' was passed with the observation that the parties did not appear to be very far apart.

There was little discussion of the 15th item, ''Funeral Leave,'' except that the parties discussed what constituted ''immediate family'' and how certain days of funeral leave were to be counted in terms of when it began and ended.

The 16th item of the Union's proposal was ''Holidays.'' At the beginning of the discussion Diederich observed that ''employees'' covered by the holiday pay proposal should not include future probationary employees although the employer was still proposing to include probationary employees on the payroll at the time a contract was signed. The Union's proposal asked for an additional floating holiday. Diederich observed that there were already 10 scheduled holidays plus 1 floating holiday and that Respondent was more generous than other Sioux Falls employers in granting holidays. Miller replied that the Union based its proposal upon the needs of the employees it represented and it wanted two floating holidays, one to be voted on by the members of the Union. Diederich responded that Respondent was proposing to keep one floating holiday, the date of which it would notify the Union by March 15. Diederich added that to allow selection by the union members was unfair to those who were not members of the Union.

The parties repeated their respective positions on scheduling of holidays when the legal date fell on a Saturday or Sunday. They again got into a ''chicken-and-egg'' discussion of which came first, the employees or the customers.

The 17th item, ''Vacations,'' engendered a great deal of discussion with regard to the summer vacation shutdown. The proposal stated that employees would not be required to take their vacation during the summer shutdown; Diederich and Ori summarized again the reasons why Respondent felt a vacation shutdown was necessary: more vacation time was being earned as the employees gained seniority and longer vacations more were difficult to schedule; it reduced the total manpower cost to schedule all vacations at one time; it decreased Respondent's unemployment insurance costs because employees could earn unemployment credit if they were forced to take a layoff; and the employees had been told in May 1980 that there would be a vacation shutdown in 1981. Diederich did agree to 4 months' notice of the time of the vacation shutdown.

The Union's vacation proposal included a reference to the vacation bonus (award of a week vacation after 5 years); Diederich said that he was still checking with management, but it would probably propose to limit it to current employees, it was included in the contract and all. Diederich objected to a union proposal that employees would receive vacation pay even if they quit without notice; Miller responded that vacations are earned whether an employee quits without notice or not.

The 18th item was ''Wages.'' It stated that it incorporated an appendix ''A''; however, the appendix was not, in fact, attached. Miller stated again that the Union still sought the Minneapolis rates which would include an 85-cent-per-hour immediate increase retroactive to October 31, 1980. Miller and Diederich repeated their wage philosophies as outlined above. Diederich again stated that Respondent approached the issue of wages in terms of labor supply-and-demand and that one of the reasons Respondent was located in Sioux Falls was because of the lower wage rate and fewer restrictions upon the operation of the plant by a union. Diederich further asked Miller if the Union had any suggestions for productivity which would offset the demanded wage increases; Miller did not. The parties also repeated their respective positions on the establishment of new rates, Respondent saying it would not agree to arbitrate rates for new jobs created during the terms of the contract. Respondent was still proposing to convert night-shift premium to a cents-per-hour, as opposed to percentage, basis.

Bargaining Session No. 17; January 21, 1981

This was the first meeting attended by Carol Lambiase. She was there representing the Union and taking notes, as mentioned earlier. The parties initially discussed wage information suppplied that day by Respondent. On direct examination Miller testified that he complained that there was a conflict with information submitted at the beginning of negotiations. For example, for Labor Grade 21 (which included assemblers who made up 90 percent of the work force), the initial information supplied by Respondent was that the maximum rate was $4.70; Miller complained that the information supplied that date showed a maximum for the assemblers classification to be $4.41. Miller testified that Diederich stated that he could not explain the difference but the current figures were the maximum. On cross-examination Miller acknowledged that Diederich explained that there was a difference between maximum of a labor grade and a top wage rate of employees in a labor qrade and the Company had thought that the latter was what the Union had wanted initially. On cross-examination Miller further stated that he could not remember Diederich's incorporating any reference to ''red circles'' in his explanations for the difference between ''top wages'' for a job and maximum of the rate ranges. Diederich credibly testified that he explained to Miller that there was a difference between the top of a wage classification and the top wage of an employee in a classification; if the latter was higher, it was the result of the person being ''red circled'' in his job.[70] Miller further wanted to know what the ''job rate'' for all classifications would be under Respondent's January 8 proposal. Diederich replied that the Respondent had not formulated that yet; what it would be depended on other agreements made.

[70] *Roberts Dictionary of Industrial Relations* defines ''red circle rate'' thusly: Generally a rate which an individual received prior to a job evaluation or other adjusted wage schedules within the plant. The red circle rate is one where the wage for the particular job is higher than the rate which is called for in the job evaluation. In order to avoid having individuals oppose job classification and evaluation, it is generally agreed prior to the job evaluation that no employee's rate will be reduced as a result of the survey. Those below the rate move up to the job evaluation rate, those above are red circled . . . .'' (Bureau of National Affairs; copyright, 1971.)

The parties discussed union complaints about a layoff which had occurred during December 1980 and January 1981. Miller conplained that Respondent had not laid off volunteers first. Diederich explained why Respondent had not, repeating the reasons previously given Painter in the November 17–18 sessions for not wanting to agree to a contract clause granting employees the choice to be laid off. The parties then went to the topics of call-in pay, report-in pay, and funeral leave. Agreements were reached on these three topics.

Diederich then raised the issue of cafeteria usage. He stated that some employees and supervisors were complaining that the cafeteria was being taken over by those conducting structured meetings. Complaints, Diederich said, included reports that Mark Hubert had stood up and shouted to get the attention of 200 people and that he had shouted that the company proposals were ''a bunch of shit.'' Diederich stated that the problem was that the Union's conducting formal, structured meetings in the cafeteria deprived other employees of the use for which a cafeteria was intended. Miller insisted that the employees were on nonworking time and had the right to conduct meetings. Diederich responded that the conduct of formal, structured meetings were thereafter prohibited and that if such meetings were thereafter conducted discipline could result.

The parties then went to a discussion of jury duty. After a brief discussion regarding how to handle second-shift employees who were called to jury duty, the parties reached an agreement and signed off on this section. The parties looked around for other issues upon which agreement might be reached. They noted that they were adhering to their original positions on the issues of bulletin boards and recognition of the Local.

The parties then moved to the issue of holiday pay. Miller stated that the Union still wanted an additional floating holiday and triple pay for work on holidays. Diederich replied that the Company would not grant an additonal holiday nor would it pay more than double time for work on holidays. Miller testified that at one point during this discussion Diederich stated that Respondent would consider grandfathering current probationary employees for purposes of receiving holiday pay if the Union would agree with everything else in Respondent's proposal. Miller denied that Diederich had already agreed that Respondent would grandfather probationary employees. Miller is squarely contradicted by the December 12 issue of ''The Eye Opener'' which stated the Company had proposed it as early as December 9. Miller was given the full opportunity to explain the inconsistency, but he was unable to do so.

Bargaining Session No. 18; January 22, 1981

At this meeting Leonard Poletta appeared as counsel for the Union. Miller told Diederich that the Union did not understand Respondent's January 8 proposal which stated that ''job rates'' would be established. Diederich stated that the Company wanted to have a starting rate and an automatic increase after 90 days which would be called the job rate. Miller again asked how the previously supplied information could be reconciled; Diederich again explained while some employees did receive wages above what was stated as the rate range for particular job classifications those people had been red circled. Poletta argued that there could be no red circles unless there was a contract in effect; Diederich and Virag disagreed and stated that Respondent had many employees who were red circled and that situation was causing difficulty in formulating a wage proposal. Poletta asked for a history of how wage increases had been given to the plant employees since the plant had opened. Virag responded that would be very difficult to formulate since Respondent had given certain wage increases as a result of a survey that had been done; there were different employees on different pay schedules; and some employees were now in the bargaining unit although they had not been before. Poletta asked if Respondent could furnish that information by the next bargaining session; Diederich replied that he did not know because ''Steve has got other things to do other than just dig up information for you people.''

Then Poletta began a list of accusations of bad faith on the part of Respondent including delays in funishing information, conflicts in information, unilateral actions, and overall bad faith. Diederich responded with Respondent's position: while the prior plant manager, Joe Rainey was well liked, he gave away too much and never met production schedules; now there was new management, including Dolen, who had replaced Rainey and Respondent's objective was to operate the most efficient plant possible. While certain things were enumerated in the employee handbook as benefits to employees, they were now in negotiations and Respondent intended to be much more careful about what it places in a binding contract than what it had put in the employee handbook. Poletta accused Respondent of not paying wages it was able to pay. Diederich replied again with his supply-and-demand theory: Respondent did not base its wage proposals on the ability to pay; it based them on what lt took to hire as many employees (mostly assemblers) as it needed. Poletta argued that if Respondent offered more money it would have a more stable work force; Virag responded he could remember only one employee who had quit because she was not making enough money. Virag pointed out that most employees who came to work for Respondent were getting more money than they had ever made before. Poletta said the Respondent had a duty as a multi-national corporation to grant employees cost-of-living increases; Diederich stated that the Union was not dealing with a multinational corporation but with a division. Miller asked what Diederich (vice president of Litton Industries) was doing there then; Diederich stated that ''I am here as an adviser for this division acting as their spokesman.'' Miller and Poletta repeated their arguments that Respondent should tie wages into profits or the Consumer Price Index; Diederich replied that the Respondent would pay no more than it had to for labor in the community, and it would not be indexing wages to anything.

Miller and Poletta again questioned Diederich about why February increases had not been given; Diederich repeated that:

> Mr. Rainey had gone over and gotten permission for some of the people to get those increases, part of those increases early. That it was an exception, and that Mr. Dolen was not proposing to do that. That the August 1 increase was consistent throughout the entire corporation, and this group of people over here who got February [increases] were the only ones in the corporation that got [them] and Mr. Dolen wanted to

eliminate it. And were proposing that there wouldn't be a February increase. We were proposing that increases be in August.

Polletta then began questioning other of Respondent's proposals. At the time, of course, he had in his possession Respondent's specific proposals submitted on January 8 and the parties began discussing them. However, since the specific proposals were consistent with the generalized proposals which Diederich submitted on November 18, 1980, it is not necessary to quote the January 8 proposals at length in order to fairly reflect the positions of the parties. Therefore, I shall identify the proposals and the Union's objections to them and quote the specific language of Respondent's January 8, 1981 proposal only when it is necessary.

Poletta asked why Respondent wanted a contract only for 1 year; Diederich responded that if the Company found problems that it could not live with, it may want to change them and it did not want to be ''stuck'' with one contract for 3 years. Poletta asked why Respondent was proposing its ''Preamble.'' Diederich said that he would go over his proposal. Miller stated that the Union did not want to bargain about the ''Preamble.'' Diederich insisted that it was something over which the Union had to bargain and that he should confer with Poletta. Poletta responded that ''the Preamble doesn't belong in there. You people produce ovens. We bargain for people's wages and benefits.

The proposed preamble was:

ARTICLE I

Preamble

There are approximately 40 brand names presently available in the microwave oven market place, and in excess of 20 manufacturers of microwave ovens, including' several Japanese companies, who have recently had a significant impact on the market place in terms of market share captured. Persons knowledgeable in the industry predict that in the next several years, the number of microwave oven manufactures will be reduced considerably, most likley to less than 10, and that those manufacturers which are able to operate most efficiently and continue to improve producsivity will be among those 10.

The parties recognize that the ultimate source of Company success and employee job security is the customer, and that customers are interested in competitive prices, high quality and on-time delivery. The parties further recognize that efficiency and continually improving productivity contribute to the needs of the customers in that they enable the Company and its employees to produce microwave ovens at competitive prices.

The parties further recognize the obligation of the Company and its employees to provide microwave ovens of high quality, and to produce these ovens in accordance with the delivery requirements of the customers.

It therefore is recognized as the responsibility of all persons employed by the Company to assist in every reasonable way in producing microwave ovens of high quality in accordance with the delivery requirements of the customers, and to make all reasonable efforts to operate efficiently in order to reduce costs.

The parties agree that all persons employed by the Company shall make an honest and conscientious effort to eliminate waste and increase efficiency and productivity. The elimination of waste includes, among other things, reducing breakage, caring for equipment, minimizing the amount of time not working and the careful use of materials. It is further agreed that a constant increase in efficiency and productivity is necessary for the success of the Company and the job security of the employees and to maintain a proper competitive position for the Company in the future. It is finally agreed that there shall be a cooperative effort between Company, employees and Union toward finding more efficient ways of performing operations and that each will readily accept changes and improvements in operating procedure which are reasonably calculated to improve productivity.

Poletta accused the Company of attempting to foreclose all bargaining by its proposal on the zipper clause stating ''you are not leaving any place for the Union.'' Diederich said there was nothing wrong with the clause and it was nothing more than zipper clauses which Poletta, as a labor lawyer, had seen before.

The proposed zipper or waiver proposal was:

SCOPE OF AGREEMENT

Section 1. The parties acknowledge that during the negotiations which resulted in this agreement, each had the full and unlimited right and opportunity to make demands and proposals with respect to any subject or matter included by law within the area of collective bargaining and that all understanding and agreements between the parties as a result of the exercise of such right and opportunity are set forth in this agreement.

The parties acknowledge there are no other understanding or agreements between them, and that this agreement expressly supersedes, abrogates and cancels any practice, understanding, agreement, policy, procedure or benefit program not specifically provided for and incorporated in this agreement.

Accordingly the parties each voluntarily, knowing and without qualification waive the right to request or require further collective bargaining during the term of this agreement, and each agrees that the other shall not be obligated to bargain collectively with respect to any matter or subject not specifically referred to or covered in this agreement, whether or not such matters have been discussed, or even though such subjects or matters may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or signed this agreement.

This agreement contains the entire agreement of the parties and finally determines and settles all matters of collective bargaining for and during its terms, except as may be otherwise specifically provided herein.

Section 2. Should any authority determine that the provisions of Section 1 above are not sufficiently specific or legal to constitute a waiver or any claim or right by

one of the parties, then the party asserting such claim or right, upon the written request of the other party, shall execute and deliver to such other party a specific written waiver of the claim or right asserted.

The parties next went to the topic of bulletin boards. The article contained four sections. The Union had no objections to the third and fourth sections which provided for the creation and posting of seniority lists. The Union had several objections to the first and second sections which stated:

BULLETIN BOARD

Section 1. The Union, at its cost, shall provide a glass-encased bulletin board capable of being locked and approximately 24'' x 36'' in size. Keys to the bulletin board shall be retained by the President of the Union and the Human Resources Department. The Company, at its cost, shall locate the bulletin board, at a place of its choosing, in an area where employees shall have ready access to it. After showing them to the Human Resources Department, the Union may post on such bulletin board notices of social or recreational events (but not raffles or other events which could be construed as lotteries), union meetings, union appointments, union elections for office or other union positions, the results of such elections, the names of committee members or stewards and changes in the Union's Constitution or By-Laws.

Section 2. The Company shall have the right to remove any material from the bulletin board which is not in accordance with the foregoing Section 1, as well as any material political in nature of which disparages the Company, its management or supervision, or other employees, or which reflects adversely upon the Company further shall have the right to remove any material which would cause a disruption or interference in the business or operation of the Company or a breach of the terms of this Agreement.

The Union objected to the Company's keeping a key; Diederich responded that the Company had never agreed that it would not have a key (contrary to allegations by Dennis Painter at a previous session) and that it needed a key to regulate what was posted. Diederich did agree that Respondent would confer with the Union before it removed anything which it considered to be outside of that which was permitted by the contractual clauses. Miller objected to Respondent's proposal that no notices of a political nature could be posted by the Union; Miller stated that the Union was a political Union and wanted to post political notices. Diederich replied that Respondent did not want to provide places for the Union to post its political point of view.

After futher discussion of the bulletin board proposal, Miller stated that the Union could agree with the Company's position if the parties could strike everything in section 2 after the words ''Section l.'' Diederich responded that the Company could not agree to that union proposal and needed everything that was in section 2, as written.

The parties then discussed, holidays, vacations, voluntary layoffs, and recognition, essentially repeating the same positions.[71]

Bargaining Session No. 19; January 28, 1981

This meeting was begun by Poletta's asking for the wage history information that the Union had requested at the preceding session. Diederich replied that Respondent was working on it but that Virag only had two clericals and one was ill and the other had other things to do. Poletta accused Diederich of delaying in furnishing the wage information and further accused him of delay and furnishing seniority and insurance information. Diederich replied that Respondent was attempting to secure the information and was not intentionally delaying.

The parties then went to the subject of dental insurance. Poletta accused Respondent of unilaterally imposing increases for individuals and dependents. Diederich replied that Respondent has always passed insurance increases along to employees. Miller replied that Respondent had never before charged employees for individual dental coverage. Diederich responded the Union was just complaining about the way the increase was handled not that it was passed along.

The parties then got into a long discussion of recognition of Local 1108. There were several proposals by Miller, verbally and in writing, but Diederich would never agree to use the word ''recognize'' in reference to Local 1108 even to the extent of saying that Respondent would ''recognize'' the Local as the agent of the International. Diederich insisted that Respondent would deal only with the International and any arrangements made between the International and the Local were the business of those two entities but there was no legal compulsion that Respondent recognize Local 1108 for any purpose and Respondent did not wish to do so.

(The parties then had a long discussion about the ejection of employees from the lobby that morning, as discussed above in sec. III,C,8. Poletta, in effect, accused Respondent of unfair labor practices in regard to the incident; Diederich stated Respondent's defense including a denial that supervisors had ever conducted handbilling in the lobby.)

The parties next returned to the topic of bulletin boards. Diederich noted that Respondent had agreed to the Union's request to place the bulletin board in the cafeteria, and had agreed to increase the size of the bulletin board, and had agreed to consult with the Union before taking anything down. Miller replied that there was still no agreement until the words after ''Section 1'' were stricken from section 2 of Respondent's proposal because such language was not necessary.

Working from the Union's January 8 proposal the parties then went over their differences on seniority. Miller again asked why the Company refused to agree to the Union's proposal to rank by alphabetizing employees hired on the same day; Diederich repeated it, arbitrariness. The Company continued to insist on a 90-day probationary period and the Union objected that it was too long; Diederich said that such probationary period was needed to evaluate attendance as well as performance. The Union objected to the Company's

[71] I discredit Miller's testimony that Diederich stated that the Union's verbal recognition proposal made on January 22 sounded ''pretty good'' and that the Union should write it up.

refusing to agree to pay holiday pay to future probationary employees. Diederich stated that it made no sense to pay holiday pay to someone who had just been hired and, even though Respondent had done it in the past, it was attempting to change the practice. Diederich agreed to give a seniority list every 6 months with updates by the 15th of each month thereafter reflecting new hires and terminations. Miller objected to Respondent's proposal that recall rights last only 6 months stating that the employee handbook granted employees that right for a year. Diederich responded that if Union were free to ask for 2 years, as it was, respondent was free to ask for 6 months. Miller objected to Respondent's proposal that employees who take full-time employment while on layoff be terminated; Diederich responded that if an employee consciously accepted permanent employment elsewhere, he should no longer be considered an employee of Respondent. The parties were in agreement that an individual on medical leave Eor more than 12 months would lose seniority; however, the Union stated that if an employee was on workers compensation leave he should not lose his seniority; Diederich replied that it was the same as any other illness and the Company proposed to terminate any employee out for 12 months, even if he was on workers compensation leave.

Then the parties went to Respondent's propsal to terminate from the seniority rolls any employee who failed to call in for 2 days unless physically unable to do so. Miller stated that it should be 3 days as stated in the employee handbook. Diederich replied that he would change it if Miller could justify an employee failing to call in for 1 day when he was able to do so. Miller could not. The parties retained their positions.

The parties next went to Respondent's proposals that it had the right to lay off employees with absolute discretion for a period up to 2 weeks; Miller asked for the reasons; Diederich repeated his reasons stated previously to Painter at bargaining session No. 9. The parties also repeated their respective positions on voluntary layoff and the reasons for their positions.

The Union had proposed that layoffs be by volunteers, then probationary employees, then by plantwide seniority. The company proposal which was reviewed at this session was that probationary employees be laid off first then:

> (b) In reoognition of the responsibility of the management for the efficient operation of the plant, it is agreed that in all cases of layoffs in excess of two (2) weeks, the following factors shall be considered:
>
> (l) Skill
> (2) Ability to perform the work required
> (3) Efficiency
> (4) Experience
> (5) Attendance record
> (6) Potential for advancement
> (7) Versatility, ability to perform more than a single job
> (8) Attitude and ability to get along with co-workers
> (9) Quality.
>
> Where factors (l) through (9), inclusive, are relatively equal, then plant-wide seniority shall be the determining factor. The Company's determination of an employee's qualifications under Item (l) through (9), inclusive for the purposes of this section, shall be final, unless it is established through the grievance procedure that such determination was unreasonable and arbitrary.

Diederich told Miller that Respondent made this proposal in the interest of efficiency.

On shift preference the parties were in agreement that the Respondent could start up the new shift and choose the employees whom it wished to start it; employees could volunteer for a shift but the selection was up to Respondent. She parties had a long discussion regarding the use of seniority, as opposed to other qualifications, when selecting employees for layoff and recall, and repeated their respective positions.

Bargaining Session No. 20; January 29, 1981

The meeting began by Miller again asking why the Company would not agree to alphabetizing employees hired on the same day for seniority purposes. Diederich repeated his explanation previously given. The parties agreed that Respondent would continue to offer its stock purchase plan and retirement plan as long as Litton Industries, the parent corporation, continued both plans. The parties agreed on an educational assistance program but were unable to agree on continuation of the employee discount oven-purchase program; Diederich stating that the latter program was being reviewed because it was bad public relations to have ''seconds'' in the marketplace, even if they were only in employees' homes. The parties then went to bulletin boards; Miller repeated that the Union wanted to strike everything in the company proposal after the words ''Section 1,'' in section 2 of Respondent's proposal because the Company did not need both parts of that proposal. Diederich replied that Respondent had gone as far as it would on the issue of bulletin boards.

The parties next went to holidays. Diederich stated that the Company would agree to designate the floating holiday by March 15 if it was not to be during the Christmas season. Diederich pointed out the Company had already agreed to excuse employees from being absent the day before or after a holiday if it was for jury duty, funeral leave, military leave, or excused leave of absence. Miller said that, in addition to those concessions, the Union wanted sickness to be an excuse for missing the day before or after a holiday so that an employee would still receive holiday pay. Diederich responded that such a provision was subject to abuse. Miller stated that the Union still wanted triple time for holidays. Diederich said that he would agree to that if the Union would agree that the Company could designate the floating holiday by March 15 and that it could reschedule Friday and Monday holidays when a holiday fell on a Saturday or Sunday. Miller would not agree; he stated that there were other things that would have to be considered at the same time especially the fact that the parties were still apart on the eligibility of probationary employees for holiday pay. To this Diederich stated that it should not be a problem because Respondent had agreed to grandfather all employees employed as of January 1, 1981. Miller responded that the Union represented future employees. Diederich stated, as an additional reason for Respondent's position on holiday pay for probationary employees, that the cost of holiday pay was then greater because Respondent had up to 150 probationary em-

ployees at a time. Diederich further stated that new employees would be told when hired that they did not get holiday pay during their probationary period and they would understand that was not a term of their employment. Miller further stated that the Union wanted holiday pay for any employee laid off within 30 days of a holiday because Respondent could lay off employees in order to avoid paying holiday pay. Virag denied that Respondent had ever done such a thing; Diederich stated that he would check with Mike Dolen and see if Respondent would agree to paying holiday pay to any employee laid off within 10 days of a holiday as was the practice in Minneapolis.

The parties next turned to the respective proposals on supervisors working and group leaders. Miller objected that the company provision was too broad and would allow supervisors to work almost anytime. Diederich acknowledged on cross-examination that Respondent was seeking to avoid grievances which were premised upon supervisors or other nonbargaining unit employees doing ''bargaining unit'' work. Miller further stated that the Union did not want group leaders to discipline employees'' or recommend discipline. Diederich responded that group leaders should make recommendations but supervisors would investigate. Miller, as he had done before, stated that he did not want such a provision in the contract.[72]

Diederich asked Miller if the Union was still insisting upon recognition of the Local. Miller replied by asking if Respondent would recognize the stewards. Diederich responded that Respondent recognized them as representatives of the International. Miller asked if an employee could get a steward and talk to a supervisor about a problem. Diederich responded that he could not; there were 25 stewards and there had not been negotiated a system of entertaining grievances and no provision for taking employees off the job to talk to supervisors about problems. Diederich stated that if there was a problem that a steward could contact Virag during lunch or break period or after work and arrange a time for discussion. Grievances should be directed to Virag because he knew what was going on in negotiations and there would be no adjustments in conflict with what had been negotiated.

The parties concluded with a discussion on wages. Miller argued that the Bureau of Labor Statistics had announced an increase in the cost of living which further warranted a wage increase by Respondent. Diederich responded that the BLS survey included employees such as those at Morrells' (a unionized paking house in Sioux Falls) and construction workers, and these inclusions rendered the statistics useless. Diederich added the Respondent did not base its wage proposals on statistics compiled by the Government; again he stated Respondent would pay what it had to get the workers it needed, and no more.

Bargaining Session No. 21; February 10, 1981

Miller testified that at this meeting the Union complained about certain conflicting wage information the Union had received. Diederich denied any discussion of wage information at this meeting. To the extent they differ, I credit Diederich. I believe that Miller was confusing this meeting with that of February 11.

The parties reached agreement on supervisors working and leaves of absence. Respondent had made several concessions requested by the Union; including an acknowledgment that the primary function of a supervisor was to supervise. Respondent further agreed to leaves of absence for attendance at annual International union meetings and meetings of Union's District Council which are held three times a year.

The parties then discussed the Union's proposal for plant visitations. Diederich stated that the Union's language sounded mandatory and that Respondent would not agree to a provision that the Union could send a representative to the plant and get a visit any time it wished. Diederich further stated that he could agree that a union representative could come to the plant during working hours for the purpose of investigating grievances but not to conduct ''official Union business'' as the Union proposed because he did not know what that term meant. Diederich also stated that the Company was concerned about the employees being disruptive when Miller or some other union representative appeared to investigate a grievance. Miller said that the Union would try to control the employees but he could not guarantee how they would react. Diederich responded that disruptions would be grounds for denying further visits.

Bargaining Session No. 22; February 11, 1981

At this meeting the parties reached agreement on when and under what procedures a union representative could come to the plant for the purpose of investigating grievances. Miller further testified that after the parties signed off on the agreement he stated to Diederich that he still wanted the tour, and that Diederich replied simply that a tour was ''not necessary.'' Diederich denied having given this response; moreover, he denied that a plant tour was requested at this meeting. Diederich is corroborated by Ori and Virag; neither Miller's nor Lambiase's notes corroborate Miller, and it is clear (by the appearance and accusctions by Poletta at a previous meeting) that the Union was then preparing for litigation of an unfair labor practice case at this point. I believe that, had such a terse response been given, it would have been included in the Union's notes. Accordingly, to the extent they differ, I credit Diederich over Miller.

After a discussion of plant visitation Miller stated that the Union still wanted 7 days' pay for union negotiators; Diederich refused and added that Respondent had furnished the meeting places for the past 20 meetings, including refreshments, and it was time for the Union to do so. The parties had further discussion regarding telephone usage and discipline of employees using the plant phones rather than those in the cafeteria. They reached an agreement on this issue.

At this meeting Diederich delivered to Miller a document stating the maximum rate for the different job classifications then in effect. Miller stated that the new information conflicted with prior information because the August 1980, maximum rates were lower than the July 1980 rates previously supplied. Virag agreed that this was true because the maximum rate of some jobs had been reviewed and reduced as a result of a ongoing study.[73] Miller stated that since the em-

[72] The record, at p. 9988, L. 8, is corrected to state ''should not'' rather than ''should.''

[73] The Union had a copy of the study referred to by Virag.

ployees got a 25-cent-per-hour wage increase in August 1980, there should not be a reduction; Virag responded that the maximum rate ranges for each classification still had been reduced. Virag told Miller that the obstensible conflicts were caused by many employees had been red circled. Miller argued that red circles should never be utilized to hold wages down.

Diederich told Miller that it was time that the parties discussed the Company's proposals on productivity. This proposal was:

PRODUCTIVITY

> The parties recognize the importance of maintaining and increasing productivity in the plant in order to provide for the success of the plant and the job security of the employees. The Company shall retain the right to establish standards to be met by employees on the various jobs in the plant, and to alter those standards as a result of industrial engineering, mechanization, automation, improvements in machinery or equipment or work processes, changing work processes or changing or combining jobs. The parties further recognize the right and duty of the Company to maintain and increase productivity through industrial engineering, mechanization, improved machinery or equipment or work processes, changing work processes or changing or combining jobs.

Miller replied that he had never seen anything like Respondent's ''Productivity'' clause or its preamble (quoted above). Virag gave Miller a ''mini-lecture,'' as Diederich called it, on the necessity for greater productivity stating that it was time that the unions of the country woke up to the fact that if American industry did not become more productive the country would be in sad condition. Diederich showed Miller a copy of the Mastic Corporation contract negotiated by Local 215 of the Charging Party which was effective March 4, 1979. Diederich stated that there was nothing unusual about having ''general statements in [contracts] about cooperation and things like that'' and that Mastic contract was a good example. Miller replied, as he did when presented with the Mastic contract before, that he was negotiating with Litton and not Mastic. Diederich asked Miller what specifically was the matter with Respondent's ''Preamble'' and ''Productivity'' clauses. Miller replied that the production of microwave ovens was the Company's business and the Union was there to negotiate wages and benefits for employees, not general statements of principles. He further stated that such statements were not terms and conditions of employment and that the Union was there to negotiate wages and benefits not restrictions upon employees. Miller added that the clauses were repetitious and perhaps management could get whatever it really wanted in a management-rights clause and ''forget the Productivity and the Preamble.'' Diederich responded that this was a possibility and the parties began to discuss the specific clauses of Respondent's management-rights proposal. This proposal of January 8, 1981, was:

MANAGEMENT'S RIGHTS

> Section 1. The Company retains all rights to manage its plant, direct its work force and allocate its capital, which it possessed prior to the execution of this agreement, unless such rights are waived, curtailed or restricted by clear, specific and unambiguous language in this agreement.
>
> Section 2. Such rights include, without limitation, the right to plan, direct, control, increase or decrease operations; to determine the products to be manufactured, the rate of manufacture and method and processes of manufacture; to determine the number and location of its plants; to determine the types of work to be performed and the machinery and equipment to be utilized; the right to subcontract work either inside or outside the plant; to determine the qualifications for and select its managerial and supervisory forces; to adopt standards of production, and engage in industrial engineering, mechanization and automation; to create new jobs and determine the qualifications for those jobs, and to combine or change existing jobs; to hire, promote, demote, transfer, direct, assign work to, and discipline or discharge for cause, employees of the Comapny; to determine the schedules of production; to determine who shall be hired and the number of employees to be employed; to lay off employees; to establish, maintain, enforce, rescind, amdend, alter or change reasonable work and safety rules, regulatoins or policies; to train employees and to establish training programs and decide the content of such programs and which employees shall be included in such training programs; to determine the number of shifts to be worked; to maintain discipline and efficiency; to transfer or relocate its operations; to sell all or a portion of its operations; to meet with employees and communicate with employees regarding the operation of the plant; to determine the internal organization of the plant, the number and duties of various departments or operations and to shut down various departments or operations; the right to expand, curtail or limit its operations or to completely close down its operations' to classify or reclassify employees; to establish new job classifications.

Miller said his first objection to Respondent's management-rights proposal was that the Company did not need the specific examples of management rights in section 2 because everything was covered in section 1. Union employee committee member Jerry Menders added that Respondent did not need such an enumeration of rights because it had them anyway. Diederich responded to Menders and Miller that, if they conceded that Respondent already had the rights, there should be no objection to including them in the contract. Diederich added that ''if we were to have an arbitration, the more specific language, the easier it is for the arbitrator to make a decision. We want something specific in here.''

Miller asked what Respondent meant by the second paragraph of section 2 of the management rights proposal. Diederich responded by stating an example that if an employee had committed a disciplinary violation, and no employee had been discharge for that violation before, it would not have prevented Respondent from imposing discipline at

that time. Miller asked if Respondent would not be accused of favoritism; Diederich stated that Respondent was willing to assume that risk.

Miller asked what Respondent meant by its proposed right to subcontract out work; Diederich replied that Respondent was intending to be able to contract out work such as unusual heating and air-conditioning problems without having maintenance employees complain. Diederich and Ori further gave examples that if parts received from vendors were defective, or even if unit employees had manufactured some defective parts, Respondent wanted the right to be able to contract out such work.

Miller asked for explanation of Respondent's reference to industrial engineering, mechanization, and automation. Diederich responded that Respondent's engineering department was always looking for a better way to do things and, if new jobs were created, this was a proposal to cover the establishment of new rates. In answering questions about the management-rights clause, Diederich explained to Miller that by ''without limitation'' that Respondent meant ''that [just] because we have specified what is set out, we are not limiting ourselves to just those things that are specified. After this explanation, Diederich asked the Union to take caucus to determine if it could then agree to the management rights clause and, if so, we could drop our productivity and preamble provisions.'' Miller stated he could answer the question in the morning; Diederich told him that he wanted a ''yes'' or ''no'' answer and did not want Miller coming back ''and start nit-picking it apart. Miller said he would.

Miller stated that the Union was still looking for checkoff; Diederich repeated the reasons he gave at the December 11, 1980 session for Respondent's refusal to agree to checkoff.

The parties briefly discussed Respondent's proposal for a zipper clause. Miller asked what Respondent meant. Diederich told him that Respondent wanted to set forth all the agreements and did not want any ''opened-ended agreement.'' Miller replied that the Union was not there to negotiate away benefits.

Bargaining Session No. 23, February 12, 1981

At the beginning of the meeting Diederich pressed Miller for his answer to the proposition that the Company would drop the productivity and preamble proposals if the Union would accept Respondent's management-rights clause. Miller refused to give an answer at that point. Miller stated that he wish to talk about the Company's ''takeaway's.'' Diederich asked Miller what he was talking about and Miller recited a listing:

(1) No February wage increase. Diederich said Respondent was not going to give wage increases in February as well as August and he repeated the reasons given previously. Diederich added that Miller knew the Respondent was not going to propose the February increase as early as the Respondent's written proposal of November 18.

(2) Forced vacations during summer shutdown. Miller objected on the grounds that it was not a past practice; Diederich repeated the reasons for the Company's position and added that the employees had been given ample opportunity to ''bank'' 5 days of vacation credit if they did not wish to take a layoff during the summer shutdown period. Miller responded that not all employees will have been there long enough to earn that much vacation credit.

(3) Charge for dental insurance for employee-only coverage. Diederich responded that the Company was not going to absorb all increases and the cost of insurance. Diederich reminded Miller that Respondent had offered to bargain on the issue when Dennis Painter was representing the Union on November 18 and 19.

(4) Elimination of 12 paid sick days. Virag responded that the Company needed to control absenteeism because employees were using the sick days for such activities as skiing; Diederich said that the program had been an incentive to take time off. Diederich added that Respondent intended to introduce another plan and would pass the savings on to the employees. Diederich further stated on this point that since Respondent was entering a legal, binding contract it wanted to be sure it had something it could live with.

(5) Elimination of holiday pay for probationary employees. Diederich responded that it was a poor policy to start with; it was expensive and it became more expensive as Respondent got larger, and that Respondent still proposed to do away with the policy.

(6) Elimination of the practice of allowing employees to volunteer for layoffs. Diederich, as well as stating that Respondent needed to eliminate the practice to operate more efficiently, repeated his reasons previously given Miller for the Company's position on this point.[74]

(7) Elimination of the program which gave employees a bonus of a week's vacation after the fifth year of employment. Diederich responded that he still had not gotten an answer on his suggestion to Dolen that Respondent agree to grandfather all current employees for purposes of this issue.

(8) Loss of seniority after layoffs of 6 months while the handbook provided that employees retained their seniority for 12 months of layoff. Diederich responded that the Union was proposing 24; therefore, Respondent felt free to propose 6. Miller further objected to Respondent's proposal that employees lose their seniority if they take another job while on layoff. Diederich responded that the Company's proposal applied only to those employees who made a conscious decision to take other employment and Respondent's position would have the effect of taking two employees off the unemployment rolls.

(9) Changing the method of payment of night shift premium from percentages of wage rates to cents per hour. Diederich asked how Miller could say it was a ''takeaway'' if he did not know what cents per hour would be. Miller responded that the night-shift premium would obviously go up with any wage increase. Diederich agreed saying that it was a cost item, which Respondent was opposed to absorbing. On cross-examination Miller acknowledged that most contracts he had negotiated had cents-per-hour, rather than percentages, for night-shift premiums; in fact, he acknowledged he could not recall any other which had a percentage night-shift premium.)

(10) Increase in group insurance was a takeaway since the premium actually had gone up 2 months before the election.[75] Diederich responded he had been ordered to reduce

[74] In his cross-examination Miller lapsed into calling voluntary layoff ''voluntary overtime,'' but it is clear which he was talking about.

[75] On cross-examination Miller added that Diederich replied that he was not going to raise the insurance premiums ''during the election.'' Miller had not

Continued

Respondent's insurance costs. He explained the timing by stating that he did not want to put the increases into effect until the matter was discus sed with the Union: Diederich added that it was still a matter for negotiations, and that he had proposed to split the increase in the same ratio that Respondent had always done between itself and its employees, and that the Union had only counterproposed that Respondent pay all increases.

(11) Miller objected to Respondent's job posting policy because it limited employees to bidding and moving up once per year. Diederich responded that many contracts had this. (As noted previously the issue of job bidding and posting was an extremely complex matter which was ultimately resolved and there is no evidence of bad faith on the part of the Respondent on this issue.)

(12) Elimination of smoking in the cafeteria, as Respondent had previously proposed. Diederich responded that employees and others using the cafeteria were complaining about the dense smoke. (Respondent did not, in fact, eliminate smoking in the cafeteria.)

(13) Elimination of past practice of allowing volunteers to work during inventory week. Miller stated for 1981 Respondent has just chosen who it wanted. Ori responded that Respondent needed the employees whom it had selected.

After listing the 13 ''takeaways'' Miller asked if Respondent had any movement on any of them. Diederich responded that he had no movement to offer on any of the items enumerated by Miller and added that the Union was proposing ''takeaways'' by proposing that supervisors be prohibited from doing any work, proposing that Respondent abandon its newly established policy of forced vacations during summer shutdowns, and proposing ''to eliminate Respondent's practice of mandatory overtime. Miller again insisted that such matters were granted to the employees by the previously existing employee handbook; Diederich responded that the handbook was not a legally binding contract and, now that Respondent was negotiating a contract, Respondent wanted to be more careful about to what was included.

After discussion of the ''takeaways'' the parties entered into a discussion of their respective grievance procedure and arbitration proposals.

Miller testified that he objected to Respondent's grievance procedure proposal in the following particulars.:

(l) Miller objected to a union steward being required to list a specific section of the contract involved at the first step. Miller stated that the steward might not always know which section was involved. Diederich replied that Respondent might base its decision on the contract section cited, and it could run the risk of additional, and unnecessary, financial losses. Miller stated that the specific section could be stated by the third step. Diederich pointed out that third step meetings under the Union's proposal would only occur once per month and Respondent could incur a month's unnecessary liability. Miller replied that if money was involved, perhaps third step meetings could occur more frequently.

(2) Miller objected to Respondent's step 2 proposal that grievances be deemed dropped at step 1 if the steward does not advance it within 3 days; Miller stated that if a grievance is not resolved at the end of 3 days, it should go automatically to the second step.

(3) Miller objected to there not being specified that there would be a meeting at step l; he did not want just a ''paper'' filing of a grievance. Miller testified that Diederich replied that Respondent would agree to a meeting within 24 hours of a grievance being filed.

(4) In regard to step 2 of Respondent's grievance proposal Miller objected that it provided only that the chief steward and plant superintendent meet alone to discuss the grievance; Miller stated that the chief steward might not have even been involved and that the area steward and the grievant himself should be allowed in the meeting. Miller further objected to Respondent's proposal that grievances be deemed dropped at step 2 if not advanced by written notice submitted by the chief steward; Miller stated that a grievance should automatically go to step 3 if not resolved within 3 days of the step 2 filing.

(5) Miller objected to Respondent's step 3 proposal that the union representative and Respondent's human resources director meet alone to resolve grievances in the third step; Miller stated that the entire grievance committee should be there. Miller further objected to Respondent's proposal that if the human resources director does not reply within 3 days, the grievance ''shall be deemed denied.'' Miller stated that Respondent should give an answer. Diederich stated that Respondent would give a written answer. Miller further objected that 3 working days for a reply under step 3 was ''pretty restrictive''; Diederich agreed that the time could be extended by mutual consent.

(6) Miller objected to Respondent's proposal that all handling of grievances and discussions about grievances be held before or after the termination of the day shift or on breaks. Miller stated investigation and processing of grievances should be on working time.

(7) Miller further objected to Respondent's proposal that the Union would be required to strike within 5 days if not satisfied with the Company's step 3 answer. Miller stated the Union should have the right to arbitrate grievances if not satisfied with the answer and not be bound to strike within 5 days. Diederich replied that Respondent was not proposing arbitration, but if it did agree to arbitration of a particular grievance it would want the authority of an arbitrator strictly limited, including a prohibition against reducing discharges to suspensions. Diederich further stated that if Respondent agreed to arbitration it would want only arbitrators selected from the Sioux Falls Bar Association because they were familiar with the local area and its mores.[76]

Miller told Diederich that the Union was not opposed to having the right to strike; it would like the option of having the right to strike or arbitrate but did not want to be bound to be doing it within 5 days of the third-step answer.

Diederich testified that he was asked by Miller what his objections were to the Union's proposal for grievance and arbitration procedures. Essentially reflecting the proposals made by the Company, Diederich told Miller that grievances should be filed within 3 days of the act complained of, and not 5 days as the Union has proposed. Diederich further stated that all time limits should be 3, and not 5 days as the

mentioned this on direct examination, and Diederich credibly denied having made this statement.

[76] Throughout the discussion of this case the only other unionized plants or industries in the Sioux Falls area mentioned were the John Morrell meatpacking plant and some construction companies.

Union had proposed, for the moving from one step to another. Diederich objected to the Union having ''too many people'' at each stage of the grievance procedure; he objected to weekly or monthly grievance meetings for step 2 and step 3, respectively. Diederich further testified that he told Miller that he did not want any ''final and binding'' language which would preclude review by the district courts of any arbitration decision and further objected to chief stewards having unlimited telephone time for consultation with the Union.

When Diederich objected to too many employees at step 2, he was referring to the fact that the Union's proposal would require three employees present; at step 3 the proposal would require as many as six employees being present. Diederich told Miller this would take too many employees off the production line.

Detracting further from his credibility, Miller left out of his direct examination, but admitted on cross-examination, the fact that at this meeting he again requested recognition of the Local 1108, as well as the International, and that Diederich responded that the Local was not certified and that Respondent intended to file charges over the Union's insistence that the Local be recognized.

Bargaining Session No. 24; February 18, 1981

At the beginning of the meeting Miller asked about terminations of probationary employees who had been on layoff. Virag replied that Respondent was doing the employees a favor because those probationary employees selected were not liked by their supervisors because of their work performances. Miller stated that union supporters had been selected; Diederich denied it.

The parties then moved to the vacations issue, comparing company proposals and the union proposal. There was much discussion over the Company's insistence on continuing the vacation shutdown policy it established for 1981. Diederich stated ''the Company is not planning on changing its position on the vacation shutdown, period.'' Miller stated that there was no way that the Union could go to the membership with a proposal that included a vacation shutdown. Diederich responded that, in that event, there would be no agreement. The other principal point of disagreement on vacations was that the Company insisted that the employees who did not give 5 days' notice before quitting would not receive vacations, even if the vacations had accrued; Miller insisted that accrued vacation should be paid whether or not notice was given. The parties reviewed their respective positions on bulletin boards and noted that neither had any movement to make.[77]

The parties then moved to a ''No Discrimination'' clause proposal contained in Respondent's January 8 package. After discussing language acknowledging the Company's right to take into consideration any family relationships between employees and prospective employees, an agreement was reached and signed off.

The parties had an extensive discussion over respective health and safety proposals. The only substantial agreement was that the Union did acknowledge that employees who filed false claims of injuries on the job could receive discipline including discharge. Miller stated that the Union wanted a safety committee; Diederich stated that the Company accepted its responsibility for safety and could not agree to have another committee.

Miller testified that during this meeting he objected that information supplied to the Union reflected that insurance premiums for dependents had gone up in August. Miller asked why there had been no increase then and Diederich replied that ''it would not have been a very good time to do it.''[78]

During this meeting the Union again repeated its demand that the Local be recognized. Diederich refused again to use the word ''recognize'' in reference to the Union but did state that he would include a written provision that the Company did ''acknowledge and agree'' that the Union was an agent of the International.

Also during this meeting Miller again requested that the vacation bonus be continued; Diederich again stated that he was still talking to management about grandfathering current employees but had no intention of including future employees in any such provision.

Bargaining Session No. 25; February 19, 1981

The parties began the session by discussing arbitration. Miller showed Diederich a copy of an expired contract with another employer in arguing for his proposed right to strike or arbitrate unresolved grievances. Diederich asked if Miller had other contracts which he had previously promised; Miller said that he did not and would not produce contracts he had previously indicated to be in existence. Miller asked if Respondent would agree to a provision in the current General Electric contract which allowed a year for the Union to decide if it wish to strike over unresolved grievances; Diederich stated that any right to strike should be for a shorter period of time.

The parties discussed health and safety; Miller stated that the Company should provide ''sit down'' work for employees injured on the job; Diederich replied that Respondent would attempt to accommodate injured employees but that is not always possible and Respondent would not engage in a practice of ''make work.'' The parties discussed other matters of health and safety and finally an agreement was reached at this session. After the section was signed off, Miller stated that the Union still intended to have its own safety committee; Diederich said the Respondent had no objection to the existence of the committee, but he would not agree that it had any authority. The parties further acknowledged that agreement on the health and safety issue did not constitute agreement on the issue of whether Respondent would abolish its sick day program, as it was proposing.

The parties had an extensive discussion regarding job bidding and posting, and then they went to the issue of layoffs. Miller commented that he reviewed 23 contracts and none had discretionary layoffs for a 2-week period. Diederich said he wanted to see the contracts referred to and Miller replied that he was not authorized to produce them.

In the discussion of job bidding and posting Respondent had taken the position that awards should be given on the

[77] The transcript, p. 10,149, L. 9, is corrected to change ''recommendations'' to ''representations.''

[78] On direct examination Diederich was asked about discussion of insurance at the February 18 meeting and said ''I don't recall any.'' Therefore, Miller's testimony is undenied.

basis of performance rather than seniority. Employee Carrie Dickens stated that previous awards and promotions had been given on the basis of ''the brownie system.'' Dickens added, ''I'll probably never get a promotion because I am not going to brown-nose. Diederich responded, ''With an attitude like that, I have to agree with you.''[79]

At the end of the meeting the parties, working first from the Company proposal and then the Union's, made a list of areas of disagreement. The areas were: preamble; recognition and definition of bargaining unit; bulletin boards; seniority; timeclocks and breaks ''hours of work); mandatory versus voluntary overtime; voluntary layoff; holidays; compulsory vacations (during plant shutdown); wages; payment of insurance premiums (including health and dental); job posting and bidding; discipline and discharge; grievance procedure and arbitration; productivity; management rights; scope of agreement; duration; sick days; employee discounts for oven purchases; no- strike and no-lockout; the authority, if any, of a Union safety committee; dues checkoff and union security; and the Union's request for pay for negotiating committee members.

At the end of the meeting Diederich asked if the Union had any movement on Respondent's proposed introductory clauses and its recognition clause. Miller stated he would not agree to Respondent's introduction and would agree to Respondent's recognitional clause only if Respondent agreed to recognize Local 1107.

Bargaining Session No. 26; February 25, 1981

During this meeting the parties had extensive discussions regarding the authority of Union's safety committee. Additionally the Union proposed that no employee would be discriminated against because he filed an OSHA complaint. Diederich stated that he did not want to put something into a contract that says Respondent would not do something that it had never done.

The parties then entered an extensive discussion of job bidding and posting proposals, a review of which is not necessary herein.

Bargaining Session No. 27; March 5, l981

The parties began going through a list of issues compiled at the February 19, 1981 session.

Diederich asked if the Union had any change of position on Respondent's introductory paragraph. Which read:

> This Agreement is entered into effective this ____ day of December, 1980 between Litton Microwave Cooking Division, Sioux Falls Plant, located at 600 East 54th Street North, Sioux Falls, South Dakota (the Company) and United Electrical, Radio and Machine Workers of America, UE (the Union).

Miller replied that he could agree to it if it would recite that the Local is a party to the agreement. Diederich asked if Respondent dropped the preamble and productivity proposals would the Union agree to its management-rights proposal.[80] Miller responded that he could not give an answer until he saw what was done on the ''takeaways.''

On bulletin boards, Miller again stated that the Union could agree if Respondent would strike all the words after ''Section l'' in section 2 of its proposal. On seniority Miller stated that there were too many differences and he wanted to come back later, but he wanted the Company to know that he was still insisting at that time on superseniority for union officers and stewards. On hours of work Miller stated the Union still wanted two paid 15-minute breaks and 5 minutes of washup time and would not agree to any reference in the contract to timeclock.'' Diederich asked if ''Miller would agree to dropping washup time if Respondent gave 15-minute breaks and put a reference to timeclocks in the contract. Miller again stated that the Union would not be a party to any mention of timeclocks and that the 15-minute breaks were nothing more than past practice so that Respondent was not actually offering anything.

On overtime Miller stated that the Union still wanted voluntary overtime and equal distribution. Diederich replied that Respondent had never had a policy of equal distribution of overtime.[81] Diederich further stated that there was also no need for an equal distribution policy because, usually when there is overtime to be worked, the entire plant is called in. Additionally, Diederich said that if just one line is called in it is too much bookwork and a ''grievance generator.'' Virag added that Respondent wanted the right to call in people according to skills, rather than worry about who had overtime last. Ori stated that Respondent did not want equal distribution of overtime in the contract because he wanted the authority to bring back employees on overtime if they had produced bad parts. In reference to Respondent's position that overtime be mandatory, Diederich commented that such an issue is the type of thing which, once given up, the Company cannot get back and that Respondent was negotiating for a 30-year relationship.

On the issue of holidays, Respondent submitted a written proposal offering triple time for holidays and pay if an employee is laid off within 10 days of a holiday. Miller reviewed the proposals and stated that the Union still wanted holiday pay to be paid to employees laid off within 30 days of holiday; it still wanted designation of floating holidays to be by mutual consent: it still wanted a second floating holiday for a total of 12 (as opposed to the Company's proposed 11); it still wanted probationary employees eligible for holiday pay (although Miller allowed that the Union might agree to a 90-day probationary period for the purposes for evaluation only); and it wanted Saturday and Sunday holidays to be changed from Friday or Monday only by mutual consent. Diederich replied that Respondent's proposal for 11 holidays was ''adequate in the community''; it would still agree to holiday pay only after employees had completed a 90-day probationary period; Respondent's proposal stated that holidays would ''normally'' be celebrated on Friday or Monday when they fell on Saturday or Sunday; and Respondent had made a concession by agreeing to pay holiday pay to employees laid off within 10 days of a holiday. Miller replied

[79] The complaint alleges that this exchange was a threat to discriminate against union committee members such as Dickens; I disagree and recommend dismissal of this allegation of the complaint. *Northwestern Dodge, Inc.*, 258 NLRB 877 (1981).

[80] The record, p. 10,361, L. 19 is corrected to change ''we could'' to ''could we.''

[81] The transcript, p. 10,364, L. 18, is corrected to change ''did'' to ''didn't.''

that Respondent's position on holiday pay for probationary employees was a ''takeaway'' from future probationary employees and noted that Respondent had once proposed that employees would receive holiday pay if laid off within 30 days of a holiday, so the proposal of 10 days was not much of a concession. Diederich responded that the Minneapolis contract provided only 10 days; Miller stated that Diederich used the Minneapolis contract as it saw fit. Diederich replied that that was the way it was.

When the parties got to vacations Miller stated that the Union still wanted the 40-hour vacation bonus after 5 years; did not want employees to be required to take vacations during summer shutdown; and it wanted a provision which would excuse employees from overtime on Saturdays when there was a Monday holiday. Diederich replied that the parties knew each other's position on forced vacations; he stated he was talking to McCartin about Saturday overtime before holidays; he did not respond to Miller's statement about the 40-hour vacation bonus.

The parties discussed group insurance and sick days together. Miller stated that the Union was opposed to the Company's not assuming individual employees' dental insurance premiums and that all increases in insurance should be absorbed by the Company. Miller repeated that Respondent should keep its sick day program and that it should pay for unused sick days.

Diederich again attempted to get Miller to negotiate on work rules; Miller refused stating that the Union did not want work rules in the contract.

On grievance procedure Miller stated that the Union had no objection to having to the right to strike rather than arbitrate, but argued that the Union should not be required to decide if it wanted to strike within 5 days of an incident's occurrence as Respondent proposed. Diederich asked if 10 days would be enough; Miller said no. Diederich asked if 15 would; Miller said that that was better. Miller stated that other objections to the Company's grievance procedures were: the Union did not want to identify what section of the contract had been violated in the first step; he wanted the department steward and chief steward present at the second step; he wanted the grievance committee present at the third step; he wanted paid time for investigating and holding grievance meetings; and he wanted the chief steward to have the right to use the telephone for union business at any time he thought it was necessary.

On productivity and management rights Miller stated that productivity was ''out,'' and that the management-rights proposal would be discussed later after the Union saw where the Company was going on its ''takeways.'' Miller stated that the Union would not agree to Respondent's scope of agreement clause and still wanted an expiration date coterminous with that of Minneapolis, rather than December 6, 1981, which Respondent had proposed on January 8, 1981. Miller stated the Union still wanted an employee discount oven purchase plan and union security. Diederich responded that the Company was still looking at the continuation of the oven purchase plan and stated that Respondent was opposed to granting a union-security provision.

The parties returned to seniority and reviewed the differences between them. The only additional proposal exchanged was Miller's stating verbally that the Union could agree to a probationary period of 35 working days or 45 calendar days if probationary employees could immediately receive insurance and holiday benefits. Diederich refused, and insisted on 90 calendar days for both purposes.

After discussion of seniority the discussion back went to matters which Miller had previously called ''takeaways.'' Miller stated that the employees being required to take a vacation during the summer shutdown was a ''takeaway'' to which the Union still objected; Diederich replied that the ''employees had been told in 1980 to expect it and, in May 1980 they were firmly told that would be the policy next year and in the future. Miller stated that Respondent should have given a February increase and that now at least 60 cents should be granted the employees; Diederich replied that such a grant would just establish a new floor for negotiations.

Miller objected to the loss of seniority if an employee failed to call in for 2 days; Diederich repeated that if Miller could give a reason for an employee not calling in for 1 day he would change it. Miller objected to seniority being lost if an employee takes another job; Diederich replied the proposal would reduce Respondent's insurance costs and would put two people to work.

Miller said that the Company's refusal to grant holiday pay to probationary employees was a ''takeaway.'' Diederich then wrote on Respondent's holiday pay proposal that the employees could receive holiday pay benefits after 60 days of probationary period; Miller still objected to it.

Bargaining Session No. 28; March 6, 1981

Diederich presented several written proposals at this session. At the beginning of the meeting Diederich presented a proposal entitled ''Efficiency-Quality-Productivity'' as article 1.[82] A grievance procedure proposal reflected Respondent's previous positions except that it added a statement that the Union would have 10 days from the third-step answer within which the employees could strike, rather than 5.

Respondent submitted an insurance proposal which continued with Respondent's position that employee-only dental coverage and future increases in all family health insurance be shared by the employees. Respondent further continued in its position that probationary employees not be eligible for insurance benefits. Diederich submitted a management-rights proposal which was a modification only to the extent that he struck out the right of Respondent to discipline and discharge employees and the right of Respondent to establish standards of production. Diederich testified that he made these changes because the right to establish work rules was contained in a work rule section which he was to submit later and that the right to establish production standards was covered by his ''Efficiency-Quality-Productivity'' proposal.

After submission of these proposals Miller commented that he objected to the Company's passing along family insurance increases, establishing dental premiums for employee-only coverage, and requiring 60 days for eligibility for insurance. Diederich responded that the Company's position was based on the fact that the high cost of insurance is a national problem and it would make employees aware of costs; some employees had taken jobs, then they got themselves and their families treated, and then quit, driving up costs. Diederich

[82] The copy received in evidence, G.C. Exhs. 48 (a–c), is entitled ''Preamble''; on the copy actually handed the Union, Diederich had drawn a line through that word and inserted ''Efficiency-Quality-Productivity.'' It is to be further noted that p. (c) of the exhibit is a legible copy of (a).

said that Respondent proposed to increase its contribution to health insurance to an 80–20 split which was an improvement over the 60–40 split which was in Respondent's January 8 proposal. Miller replied that Respondent had previously proposed an 80–20 split[83] for family dental coverage so that was no improvement over the past practice.

The parties further discussed Respondent's proposal to require that vacations be taken during the summer shutdown. The arguments were essentially repetitions of what had been said before except that Diederich added that by having all employees take 1 week of their vacations at the same time it would reduce Respondent's employment cost by 4 percent. This figure was never questioned or disputed by the Union.

Bargaining Session No. 29; March 10, 1981

Miller suggested that the parties discuss wages; Diederich replied that it was difficult to address the issue of wages since the Union had not submitted a specific wage proposal. Miller began reviewing Respondent's wage proposal contained in its January 8 plenary proposal. Section 1 of that proposal placed the jobs into labor grades from 21 up to 28; it recited starting rates ''$3.75 to $5.72), job rates (which was blank); job rate period (from 90 to 360 days) and ''job rate classification'' (assemblers were in labor grade 21; shipping clerks were in grade 24; production control scheduler was in group 28, etc.). Section 2 stated that employees on the payroll at the time the contract was signed would work at a ''red circle'' basis if they were being paid more than the job rate negotiated. Section 3 stated that ''on August 3, 1981 the job rate set forth in Section 1 shall be adjusted as follows''; then followed the listing of labor grades 21 through 28 and a column entitled ''job rates'' which was blank.

Section 4 of Respondent's proposal provided for merit increases to be awarded by Respondent ''is its sole discussion.'' Section 5 provided an unstated for cents-per-hour shift premium. Section 6 provided for group leader pay of ''10 percent over the employee's job rate.'' Section 7 provided, in accordance with the Respondent's previous position, that new job rates would be the subject of negotiations and, failing agreement, Respondent would set a rate which would be in effect for the duration of the contract. Section 8 provided that employees temporarily assigned to higher paying labor grades would be paid the higher rate; if assigned to a lower rate the Employer would be paid the same rate unless the demotion was at the employee's request.

Miller objected to a cents-per-hour premium for any night shift and stated that the Union wanted to increase the current differential of 5 percent to 10 percent. Diederich responded that a percentage premium was what Respondent wanted to get away from. Miller objected again to Respondent's being allowed to set wage rates for new job if negotiations failed. Diederich responded that the Company did not want to turn such issues over to arbitration.

After a discussion on temporary upgrades, downgrades, and pay as a result of job bidding and posting, Miller stated that the Union was going to propose eight labor grades and orally gave some examples of how the Union wanted to classify employees. The Union then introduced a wage proposal which was laid out in chart form showing a progression of wage rates for 3 years of a proposed contract. The progressions began with an immediate increase of 85 cents per hour and brought the wages up to what Miller said were those paid in Minneapolis for the same jobs. Under Miller's proposal an assembler then making $3.75 an hour would immediately get 85 cents per hour, then 30 cents on May 1, August 1, and November 1, 1981; 70 cents on February 1, 1982, and 39 cents for May 1, 1982.

Diederich replied that Respondent had no intention of paying such high rates and also observed that Miller's proposal would have several different rates being paid for the same type of work. Diederich further questioned Miller's upgrading of several jobs into higher classifications. Diederich further stated that since there was so many other economic issues outstanding, such as holidays, and because the parties would be so far apart on wages, it would be difficult to frame a response; however, Diederich said, he would try. The parties discussed a few other issues at this session including recognition and bulletin boards, in which they essentially repeated their respective positions.[84]

Bargaining Session No. 30; March 12, 1981

At the beginning of this meeting Diederich presented another wage proposal. The first page of the proposal listed eight labor grades and the job titles which would be included in each. For example, an assembler was in grade 21 along with the custodian; inspectors were in grade 25: senior technicians and other more sophisticated jobs were in grade 27 and 28. The second page of the proposal, entitled ''Schedule A'' had four columns: ''Labor grade,'' ''Start,'' ''Job Rate,'' and ''Time.'' Under the schedule each labor grade had a starting rate and a job rate or a maximum which was 12 to 21 cents higher. Diederich explained that the job rate would be reached in the number of days indicated under ''Time.'' For the upper two labor grades, however, the time listed was ''discretionary.'' Diederich explained that McCartin felt that jobs in these two classifications were more difficult to learn and it would be to difficult to set a definite time in which the job rate was reached. Finally, Diederich explained that under this proposal Respondent was giving up its system of merit wage increases and would give automatic progressions to job rates except for labor grades 27 and 28.

Diederich further stated that under Respondent's proposal temporary upgrades would be to the minimum of the grade; temporary downgrades would be to the maximum of the lower grade, unless if at the employee's request (in which case it would be at the minimum).

The rates listed on Respondent's proposal of March 12 were to take effect on August 1, 1981.[85] Employees would

[83] Miller was correct in this: see the discussion of Bargaining Session No. 9.

[84] On cross-examination, but not on direct, Miller testified that he told Diederich that it was difficult for him to discuss a certain classification because he had been denied a tour of the plant and was just taking the employee-members' word for a description of a certain job. Miller did not testify as to what response Diederich made to such a statement. In making this assertion Miller contradicts his own testimony that February 11 was the last time a tour was mentioned until June 24, 1981. Further, Miller is not substantiated by his or Lambiase's notes which make no mention of a tour at this meeting. Finally, Diederich credibly denied that Miller mentioned a tour at this meeting.

[85] When Diederich stated that there would be no wage increases until August 1, 1981, Miller responded that employees always got wage increases at the ratification of a contract. Diederich responded that the effective date of the first raise was a negotiable item and Respondent was proposing no wage increases until August 1.

remain at their current rate until that date. For example, most assemblers (who made up 90 percent of the employee complement) were then being paid $3.75 per hour; on August 1, they would receive $4.04 cents unless they had been in grade for 90 days in which event they would receive $4.16. After presenting the wage proposal Diederich further told Miller that Respondent was prepared to make additional proposals to fill in blanks in its January 8 proposal. Diederich stated that for a night-shift premium Respondent was proposing 12 cents per hour; for group leader pay Respondent was proposing 10 percent above the job rate; for new jobs Respondent was adhering to its position that, failing union concurrence, Respondent would set a rate which would remain in effect for the balance of the contract.

Miller replied that Respondent's proposal for wages was totally inadequate and the Union still was insisting on ''Minneapolis rates.'' Diederich replied that Respondent would not be paying Minneapolis rates. Miller further stated that the Union still wanted a percentage premium for employees working night shift. On the rates for newly created jobs, Miller stated that the Union still wanted arbitration. Miller further stated that he would agree with Diederich's proposal that temporary upgrades be made at the minimum rate but disagreed that temporary downgrades, if at the employee's request, should be at the minimum; Miller stated that employee downgrade, even at the request of the employees, should be at the maximum of a grade.

Diederich told Miller that if the Union did not like his proposal it should make a counterproposal. Miller replied that he would but he wanted Diederich to know that there was certain things the Union had to have before any agreement could be reached: layoffs on a strict seniority basis (Diederich replied that was not efficient); no loss of seniority if an employee took another full-time job while on layoff (Diederich replied that Respondent's proposal puts more people back to work and would lower Respondent's unemployment compensation premium); the Union should not be required to strike within 10 days after the denial of grievances at the third step (Diederich replied that was negotiable, but the amount of time should be reasonable); grievances should be handled on working time (Diederich responded that there would be too much loss of production, especially since the Union had appointed 25 stewards).

Miller asked Diederich what Respondent's position was on increases in insurance premium; Diederich replied that for group health insurance, percentage of future increases would be split 76–24, and dental 80–20. Miller stated the Union was proposing that employees pay none of the increased cost of insurance and that as of that date the Union was putting its cost-of-living adjustment (COLA) proposal back on the table.

Miller testified that during the discussion of classifications of jobs Diederich, in response to a question by employee Eisenhauer, stated that no employee committee member was going to be downgraded. Miller further testified that Dickens stated Respondent would probably not give any promotions to committee members and Diederich responded that Dickens, Hubert, and Lawson would probably not get promotions because of their attitude. General Counsel contends that this statement is a violation of Section 8(a)(1) of the Act. Diederich credibly denied in remarks attributed to him, and I find that General Counsel has not proved this allegation of the complaint, and I shall accordingly recommend its dismissal.

Bargaining Session No. 31; March 25, 1981

At this session the Union introduced a wage proposal which essentially restated the position of the Union on issues such as shift premium, temporary upgrades and downgrades, insurance, and slotting of jobs into labor grades. Additionally, the Union proposed a cost-of-living adjustment (COLA) clause providing 1 cent per month for each three-tenths rise of the Consumer Price Index adjusted quarterly.

The Union's proposal also included a rate schedule effective as of February 1, 1981, and projected over a 36-month period. Under the schedule employees in certain grades for the number of months specified would receive certain rates and then periodic increases thereafter. Immediate increases were included; for example, it was discussed at the meeting that employee Mark Hubert would go immediately from $4.70 an hour to $6.06 per hour. Miller acknowledged that his proposal included a 25-cent wage increase retroactive to February 1. Diederich stated that Respondent was opposed to any retroactive wage increase as such increases tend to prolong negotiations and raise the floor of negotiations, and there was no real past practice of February wage increases anyway. Diederich stated that the Union's proposal was ridiculous and further argued that the ''progression'' contained many inconsistencies such as the fact that some employees who bid to a higher classification would receive an immediate pay cut.

After a discussion of wages the negotiators discussed issues of bulletin board, productivity, recognition of Local 1107, and checkoff, essentially repeating their respective positions.

The parties discussed seniority. The Union again objected to Respondent's proposed 2 weeks of discretionary layoff and selecting employees for longer layoffs upon the basis of nine factors before seniority. Diederich replied that Respondent needed to choose its best people in cases of layoff and not simply look at seniority because this was the best way to maintain an efficient operation.

Bargaining Session No. 32; April 1, 1981

At the beginning of this meeting Diederich introduced document entitled ''Modifications of Previous Proposal.'' Some of the items listed on the documents were restatements of what had been verbally proposed and the ''modifications'' were really those of the January 8 plenary proposal. In this submission Respondent proposed to eliminate the job classification of ''new models coordinators'' from the unit description (Diederich explained that McCartin felt that the incumbent employee was really an ''associate engineer''); probationary employees who had not been employed for 45 calendar days would not be eligible for holiday pay, except those who were on the payroll as of January 1, 1981. (It is to be noted that by April 1, any employee hired by January 1, 1981, would have completed his probation by this date, unless the probationary period had been extended for some reason.) Agreeing with an earlier proposal by Painter, Diederich proposed that employees who gave ''notice in writing'' that permanent full-time employment had been accepted elsewhere would be divested of seniority. (It is to be

noted that this was tantamount to a withdrawal of the proposal since an employee who had not taken such employment would not logically do such a thing.) The proposal omitted ''versatility'' and ''quality'' from the list of factors to be considered before seniority was to be used as a determining factor in selection for layoff. The proposal eliminated the section of the seniority article which provided that ''seniority'' meant plantwide seniority; Diederich explained that article was meaningless in view of the parties discussions about job classifications, and the Union did not dispute that interpretation.

The proposal would have increased Respondent's contribution to the family health insurance program from 76/24 to 80/20 percent of increased premiums. The proposal further stated:

> Add new section providing for accident and sickness insurance, starting with 4th day, a rate of $100 per week for 26 weeks.

This was Respondent's proposal to eliminate its 12-paid sick day program under which employees had received 100 percent for the first 12 days of sickness during a year and a declining amount for periods to the 130th day of illness or disability.

The proposal added that at the third step of the grievance procedure the chief steward as well as the union representative would meet with Virag (whose title had been changed to human resources manager); the employee and area steward were still excluded.

The proposal increased the Respondent's proposed shift premium from 12 cents to 15 cents per hour.

The proposal included a new schedule of labor grades and rates, effective April 3, 1981, or upon ratification if earlier, and included a new ''Step l'' between starting rate and job rate for each labor grade. For example for Labor Grade 1, the starting rate would be $4.05 per hour; step 1 would be reached after 60 days and there would be an increase to $4.12 per hour and the job rate would be reached after 30 days and that would be $4.20 per hour. Diederich stated that Respondent was proposing to red circle all employees who were then receiving more than called for by the schedule, and this comment triggered a long discussion. The Union objected to considering red circles and what it called the inadequacy of Respondent's wage proposal. Diederich replied that Respondent was paying competitive wages for comparable work in the area and it would not pay more than it had to for labor. Diederich added that under Respondent's proposal that, while some employees would be red-circled, most would be getting a wage increase, and none would receive a cut.

While Respondent's proposal of this date reduced from 60 to 45 days of employment the eligibility period for holiday pay, it eliminated the provision that the floater holiday would be designated by March 15.

After review of the proposal Miller stated objections consistent with his previous positions and the parties further got into a restatement of their respective positions on other matters such as compulsory vacations during summer shutdowns, layoffs by seniority versus other factors, and the right to strike over past practices. (Diederich again stated that the Union should get what it wanted in the contract because Respondent did not want employees grieving over past practices established by former plant manager Joe Rainey.) Miller specifically objected to Respondent's refusal to allow investigation of grievances on working time and further stated the Union wanted the right to arbitrate grievances or strike. Diederich responded that the Company was not going to agree to compulsory arbitration, but, if it did agree to arbitrate a specific grievance, it adhered to its previous position of wanting local arbitrators and severe restrictions on the right of an arbitrator to decide a grievance.

Miller verbally proposed a 60-day probationary period for purposes of evaluation and a 30-working day eligibility period for holidays; no rescheduling of Saturday/Sunday holidays to days other than the immediately preceding or following Friday or Monday without the Union's consent; 60 days' notice of any change in the designation of the floating holiday if it was other than Christmas. Diederich told Miller that Respondent would take these proposals into consideration.

Bargaining Session No. 33; April 2, 1981

At the beginning of the meeting Miller reviewed Respondent's proposals of the preceding day and stated that the Union agreed with what Respondent proposed on temporary upgrades and downgrades but agreed to nothing else and was insisting on the Union's last position on each item.

Miller objected to Respondent's system of labor grades and rate ranges for each grade stating that they were too low. Diederich responded that while his proposal was for lower maximums, they were at least attainable maximums; the previous system had only theoretical maximums which the employees had difficulty in achieving. Under Respondent's new proposal employees would receive the wage increases automatically for time in grade; there would be no merit reviews upon which raises would be dependent. During the discussion on wages Diederich also proposed that for Respondent's ''A & S'' program that Respondent would cover illness from the fourth day at a rate of $115 a week for 26 weeks. ''The previously proposed weekly benefit was $100 per week.'' Miller objected to the abolition of the ''A & S'' program and further objected to Respondent's proposed rate scale again saying that the wages that Respondent proposed were too low and he further objected that it incorporated a provision that employees currently receiving higher wage rates would be red circled and held at their present wage rate.

Diederich stated that he had discussed the matter with management and had received approval to propose that designation of the floating holiday would be discussed with the Union if it was ever to be taken during a period other than the Christmas season; however, management was not willing to agree to a 60-day notice provision of a change in designation of the floater because business exigencies might compel changing the date on short notice. Diederich added that Respondent still wanted employees to be on the payroll for 45 calendar days to be eligible, and he did not see any reason for any Union objections because Respondent had agreed to grandfather in all employees on the payroll as of January 1, 1981.

The Union introduced a seniority proposal which essentially incorporated the same positions taken previously and the parties discussed those. Thereafter, Diederich stated to Miller that he was very close to giving the Union Respond-

ent's final position on seniority. Miller replied that he did not see why Respondent could not agree to the Union's position; Diederich responded that layoff and recall by qualification was at the core of the differences between the parties and Respondent was not willing to abandon its position because it needed to select employees on the basis of what it needed to run a plant efficiently.

After the discussion of seniority, which was lengthy, the parties briefly discussed arbitration versus the right to strike. Miller stating that the Union had no objection to striking over grievances but wanted no time limit within which it had to strike or drop the grievance. There was also a brief discussion about the Union's insistence on recognition of the Local, Diederich again refusing for the reasons previously stated.

At the close of the meeting Diederich stated that Respondent was preparing its final proposal on language; Miller responded that he would be surprised if the Company did.

Bargaining Session No. 34; April 8, 1981

The respective positions on many outstanding issues were discussed with no movement made by either side. At one point, when the issue of wages was touched upon, Miller stated that the Union would have no movement until it saw that all employees were to get some wage increase. Diederich responded that red circles were necessary and could not be eliminated without Respondent being required to pay a lot more money than it was willing to spend.

During this session Diederich objected to the Union's ''Eye Opener'' of the previous day which stated that an employee suffering a long illness would be worse off under Respondent proposed A & S program because a 26-week illness at a $100 a week would equal $2,600 while under the old program, the employee would receive $2,988. Diederich pointed out to Miller that the statements in the ''Eye Opener'' had a false premise because Respondent had raised it proposal to a $115 a week (which would net the employees $2,990 for an illness of 26 weeks.) Diederich told Miller that he should correct his statements to the employees, but Miller would never commit himself to do so. Employee Eisenhauer argued that an employee making more than $4 a hour would lose out under Respondent's proposed A & S program. Diederich responded that it was the Union which picked the example of an employee who earned $4 per hour. Miller stated that the employees would lose under Respondent's proposal because there is no pay for sickness of 1, 2, or 3 days. Diederich responded that he did not disagree with that statement; still, the employee who is out 26 weeks, which was the Union's example in the ''Eye Opener,'' would be better off under Respondent's proposal of $115 a week if that employee made $4 per hour at the time he got sick.

The parties moved to Respondent's discipline and discharge proposal. Miller agreed that employees could be discharged for just cause but did not want Respondent's proposed statement that the Union agreed that certain rules were reasonable in the contract. Miller added that he did not want to negotiate work rules. Miller stated that he would agree that probationary employees may be disciplined or discharged by the Company ''for any reason'' but did not want ''with or without cause'' as the proposal originally stated.

Diederich asked for Miller's position on management rights; Miller stated that other matters need to be worked out first. Diederich asked Miller what his position on Respondent's scope of agreement (zipper) proposal was; Miller replied it was not necessary, and the Union would not agree to it.

The parties then returned to Respondent's discipline and discharge proposal. There was a great deal of repetition; the proposal listed 25 Class ''A'' rules which would warrant immediate discharge for violation and 8 Class ''B'' rules which would cause a warning or suspension or possible discharge; and the proposal had a three-step progressive disciplinary procedure. The parties went through the rules seriatim with the Union conceding validity to only a few of the proposed rules.

Bargaining Session No. 35; April 9, 1981

The parties continued reviewing Respondent's proposed work rules. Miller argued every rule, even Respondent's proposed rule against smoking marijuana in the parking lot. (Miller said it was none of the Company's business.) The parties discussed Respondent's proposed progressive disciplinary procedure, Miller argued that Respondent should give employees two written warnings before suspension rather the than the one which was proposed.

At this meeting Diederich stated that the Company was proposing a new absence program which Diederich called a ''no fault'' point system which outlined it to Miller as follows: The new policy would mean that for certain violations an employee would get one-half point (such as being 6 minutes tardy); for other violations (such as leaving work early) an employee would get one point. If an employee was absent for one full day he would get one point and if he was absent for several days at a time he would still get one point. Then, if the employee accumulated three points during a 12-week period he would be subject to a warning notice; if the employee got six points during that period he would be subject to other discipline including discharge. Additionally for every 4 weeks an employee went without getting any points, Respondent would subtract a point. Miller asked if employees would get points against them if they were sick; Diederich stated that they would, but it would not necessarily mean they would be fired for being absent, even if he accumulated 6 points in a 12-week period. In outlining the policy Diederich stated that there would be no excused absences except for vacation jury duty, funeral leave, and other officially excused absences; there would be no excuses for things like being sick or taking children to the doctor.

On cross-examination Diederich stated that a supervisor ''probably would not'' discharge an employee for absences under all circumstances. When asked by me how the point system would be recorded, Diederich stated that the supervisor would keep records, and the acknowledged that would not necessarily discuss the circumstances of the absence with the employee when the record was made.

During the April 9 meeting, Diederich presented a complete contract signed by Virag. Diederich ''highlighted'' the proposal for Miller.

On Article 1, Efficiency-Quality-Productivity, Diederich had removed the first paragraph of the article.[86]

On Article 15, group insurance, Diederich noted that Respondent was changing its position that employee-only health

[86] See the proposed ''Preamble'' and ''Productivity'' clause quoted above.

coverage cost would continue to be zero and the cost of future increases in family health insurance would be 87 percent paid by the Company and 13 percent paid by the employee, an improvement over Respondent's March 12 proposal of a 76–24 split. For dental dependent coverage, Respondent proposed an 80–20 split as for family coverage it had done before, and ''zero'' for employee-only coverage. Diederich further noted that Respondent was increasing the weekly benefit under its proposed A & S program to $125 a week in lieu of Respondent's previous absence control plan.

Diederich noted that Respondent had made a few changes in the discipline and discharge proposals as a result of discussions with the Union. In discussing how employees would be selected for layoff Diederich noted that he had removed from Respondent's proposal ''potential for advancement'' and ''ability to get along with co-workers'' as factors to be considered before seniority.

Diederich noted that his proposal on article 22, ''Grievance Procedure,'' contained a no-lockout provision as requested by the Union, but also contained an extensive procedure for grievances filed by the Company. Under the proposal if the Company was dissatisfied with the Union's response to one of its grievance, it had the right to lockout employees within 10 days of the Union's final answer.

Diederich concluded by stating that the proposals made that date contained all agreements reached by the parties on other sections and that Respondent had no further changes to make in its proposal.

As Diederich was reviewing his proposal of that date, Miller only made responses indicating the Union adhered to its position on the matters which were in dispute; he did not dispute Diederich's statement that all previous agreements had been incorporated in the Company's proposals of that date. Miller did ask Diederich where checkoff and pay for the union negotiators was covered in the company proposal; Diederich stated that the Company was not proposing those items. Miller testified that he asked Diederich if Minneapolis would agree to program checkoff into the computerized payroll would Sioux Falls agree to it and Diederich replied that Minneapolis might not always be there. Diederich credibly denied making this statement.

The meeting ended on Miller's statement that the wage proposal by Respondent was inadequate because Respondent could pay a great deal more money to the employees because ''Litton'' profits were good. Diederich replied that Miller was not bargaining with Litton Industries but with the Microwave Cooking Products Division in Sioux Falls, and the Company had spent all the money it had to spend in the proposal that was before the Union.

Bargaining Session No. 36; April 15, 1981

At the beginning of the session Miller listed objections to Respondent's proposal of April 9: Miller told Diederich that he could not be serious about any contract that excluded some 70 employees from wage increases by their being red circled. Diederich responded again that those employees were already over the maximum Respondent was willing to pay for each classification and the Respondent paid not more than it had to for comparable work. Miller objected to the Company's right to file grievances and to lockout employees. Miller objected to the lack of reference to checkoff or union security. Diederich asked if the Union wanted a union shop; Miller replied, no, that he wanted language similar to that at Morrell's Meat Packing plant in Sioux Falls. Miller objected to there being no steward present at discharges. He objected that Respondent's ''no fault'' absence control program provided no excuses for employees' being sick; he added that the program would encourage favoritism. Miller objected to Respondent's refusal to agree to layoffs by volunteers first, then probationary employees, then by strict seniority. (The negotiators argued seniority versus qualifications for selection for layoff again; when Miller argued that seniority controlled in Minneapolis Diederich replied ''that is maybe why they are building more ovens in Sioux Falls now than in Minneapolis.'')

At this meeting Miller agreed to discuss Respondent's proposed rules of conduct and progressive disciplinary procedure. During the discussion of rule Miller was extremely obstinate; he even refused to agree to include rules which he conceded to be reasonable, such as termination of seniority of an employee failing who failed to call in for 2 days when physically able to do so.[87]

Miller raised no objection to Respondent's proposal on discipline and discharge, sections 1 and 2, including the statement in section 2 that probationary employees could be disciplined ''for any reason'' without recourse to the grievance procedure. (Miller's agreement was later repudiated by Laskowitz.)

In discussing Respondent's grievance procedure proposal, Miller stated Respondent's limits on arbitrators, when an arbitration was agreed to, were not acceptable; Diederich replied that Respondent did not want arbitration decisions which would hurt its business. Diederich added that the Union was trying to get on a first contract what other unions had taken 30 years to get.

During this negotiation session Miller accused Diederich of giving conflicting wage information because the top rates varied between submissions of information; Diederich responded that the Company had given the Union what it had asked for and the confusion was caused by the Union asking for top rates and maximum rates of ranges and that the problems were compounded by so many employees being red circled, so that rates for some employees were higher than the maximums of the rate ranges for the classifications of the employees.

Bargaining Session No. 37; April 16, 1981

At the beginning of this meeting Diederich handed Miller several pages of proposals which modified Respondent's proposal of April 9, and stated that he would orally outline the differences. Diederich first noted that three sentences of the ''Efficiency-Quality-Productivity'' proposal had been deleted.[88]

---

[87] One Hugh Harley is Miller's superior in the Union. At p. 4622 of the transcript Miller was asked:

> Q. Now, did Mr. Harley tell you to try to keep these rules out of the contract?
>
> A. He said, if at all possible, yes.

However in his testimony at p. 4626 he was asked and testified:

> Q. The question is, specifically, did Mr. Harley tell you to try to keep the rules out of the contract?
>
> A. No.

[88] These were the final and penultimate sentence of the original ''Preamble'' clause and the final sentence of the original ''Productivity'' clause, each of which are quoted above.

A change was made in Respondent's seniority proposal to indicate that layoffs for periods of less than 2 weeks ''may be made the discretion of the Company'' rather than ''shall be made . . . .'' Some of the factors to be considered before seniority in selection for layoff were deleted, namely: ''experience,'' ''skill,'' and ''ability to perform more than a single job.'' Therefore, remaining the four factors which, if relatively equal, would cause the selection for layoff to be left to seniority were ability to perform the work required, efficiency, attendance record, and quality. Respondent further modified the selection for layoff provision to state that the determination of an employee's qualification under those last four items would be subject to the grievance procedure. (The April 9 proposal had also said that layoff selection would be subject to the grievance procedure, but under the prior proposal the selection would have to be shown to be ''unreasonable and arbitrary'' for management's selection to be overturned.)

Respondent's discipline and discharge proposal was modified to require discussion of any amendments to rules of conduct, but retained the right in Respondent to establish and enforce such rules.

Diederich testified that he told the Union that the progressive disciplinary system for the absence program was amended to include a written warning before suspensions, and suspensions were limited to 3 days. Diederich further pointed out to Miller that the absence control proposal of that date included a review by a management panel composed of a staff level manager, the manager of human resources (Virag), and a department level manager of the employees' choice. Diederich stated this proposal was added in response to Hubert's and Lawson's remarks that Respondent's proposal would allow employees to be fired for illnesses. Miller asked where the Union would fit in; Diederich replied that if there was a meeting which included the employees, a steward would be permitted to be present because that would be an investigation which could lead to discipline, or if an employee was discharged or otherwise disciplined, he could file a grievance and the Union would come in at that point.

Diederich pointed out that, in its grievance procedure and no-strike proposal, Respondent had removed the language which stated that injunction was a proper relief for breach of that section. Diederich further noted that Respondent's grievance procedure proposal was amended to make clear that a 12-month limitation on recall rights applied only to economic strikes. (That is, Respondent did not claim right to replace employees engaged in an unfair labor practice strikes.) Diederich pointed out the Respondent was amending its management-rights proposal, first paragraph of section 2, to be introduced by the phrase ''unless specifically abridged by some provision of this agreement'' preceding an enumeration of the rights which Respondent wished to maintain. As Diederich stated he told Miller, this would ''make it clear that the Company was not waiving any of its management's rights unless there [was] some specific language which said that.'' Diederich further pointed out that Respondent was making certain modifications in its listing of rules of conduct, and its progressive disciplinary procedure clauses pursuant to the requests of the Union. Diederich stated that Respondent's proposal of that date reflected that Respondent would offer other benefits such as discount ovens, as long as they were generally available to Litton employees.

The Union proposed a management-rights clause to which Diederich objected because it dropped about 10 of the rights which Respondent had enumerated in its proposal. Specifically, the Union proposed to eliminate the unilateral rights of Respondent to establish the number and location of plants, to subcontract all work, to have sole discretion over creation over new jobs and qualifications for new jobs, to combine jobs, to demote employees, and to manage employees in the interest of ''efficiency'' (without some qualification), to transfer or relocate the business, to meet with the employees without consulting with the Union, and the right to close down the plant and establish new job classifications. Miller explained his proposal by stating that the Company had a duty to negotiate these items if they came up during the contract; Diederich responded that the Company wanted these rights in the contract.

Miller further objected to the Company's scope of agreement (zipper) proposal on the ground that it was too broad.

At the close of the meeting Diederich told Miller that Respondent's April 9 proposal, as revised by the proposals of that date, constituted the final position of Respondent on all issues. Miller replied that there were many issues outstanding and the only way to resolve them was to continue bargaining.

Bargaining Session No. 38; April 29, 1981

At the beginning of the meeting Virag submitted some information previously requested by the union; Lambiase asked for other information regarding new hires and Virag promised to submit it.

After the information was discussed, the Union presented several proposals. Its first proposal was intended to substitute for Respondent's proposals on Efficiency-Quality-Productivity, management rights, and scope of agreement. This proposal incorporated several of the recitations of the company proposal regarding the need for competitive prices, high quality of product, and on-time deliveries. The management-rights proposal was a severely truncated statement that:

> The Union recognizes that subject to the provisions of the agreement, the supervision, management and control of the Company's business operations and plant are exclusively the function of the Company.

The Union's scope of agreement clause was a general statement that, if Federal or state law required action by the Company inconsistent with the agreement, the parties would meet and negotiate over the matter, and if agreement was not reached the Company may put official orders into effect but the Union could grieve over any changes made. This last proviso was the only one discussed at this meeting. Diederich stated that if the Company was required to take an action by state of Federal law there was no point in attempting to negotiate over the matter and certainly there was no point in grieving because if something can or cannot be done there was no point in arbitrating (or presumably striking) over the matter.

The parties next discussed the Union's proposal of that date which was submitted as a substitute for Respondent's discipline and discharge proposal. The first two sections adopted the Company's proposal regarding the Company's right to discipline and discharge employees and a statement

that probationary employees ''may be disciplined or discharged by the Company for any reason.'' The Union's third section of this article granted employees the right to request a steward when discipline is dispensed; Diederich objected again stating that the Company was not willing to permit a steward to be present except during investigations which may lead to discipline.

The Union added to its discipline-discharge proposal a section which recited that the Company would have the right to establish reasonable rules but they would not be part of the contract: they would be posted in conspicuous places; the establishment of new rules would require agreement from the Union; and the Union could grieve the ''application and/or interpretation'' of any of the rules; and, finally all the foregoing was ''provided we come to agreement on the rules.'' As is obvious, the provisions are inconsistent in that they say the Company has the right to establish rules, but agreement with the Union is required. Diederich pointed out this inconsistency and further stated it was inconsistent of the Union to propose that work rules would not be part of the contract but the Union had a right to grieve over the application. Miller stated that he did not want the rules in the contract in the first place and that if there was no agreement on the rules he did not want them posted either.

Diederich further pointed out to Miller that the Union had made no counterproposal on an absence program. Miller responded that he did not want such a program in the contract but if the Union did agree to some sort of absence program there could be no points against employees if they or their children were ill or had to go to the doctor. Miller further complained that the Company's proposal would ultimately allow favoritism and that ''pets'' would be penalized and others not. Diederich replied that he thought the proposed system was fairly balanced and he pointed out that it was not mandatory that Respondent fire employees if they accumulated so many points at a certain time and further explained the Company's position; Diederich testified:

> I said that we were trying to get away from the concept of excused and unexcused. Because there [are] always charges of favoritism when the Union had that system. And even though supervisors are going to have some discretion here we're trying to make it more of system where, if you are absent, you are absent and you get points. And that you don't have to be discharged. Or you don't have to be disciplined.

At this session the Union further introduced a proposal for a progressive disciplinary system. Diederich objected to it because it would allow as many as four violations of the same rule before an employee could be discharged.

On this date the Union further proposed a revised dues-checkoff article and again requested 56 hours pay for the negotiating committee, this time limiting the number of members to five. Diederich asked if by proposing checkoff the Union was abandoning its request for a union-security agreement: Miller replied, no, the Morrell's language was still on the table and that it was legal in South Dakota, although it was a ''right to work'' State. Diederich responded that he thought the language was illegal because Hubert or some other union employee could take it around to a nonmember and convince them they were required to join the Union. Miller replied that, if it was legal, it was legal. Diederich further stated that the Company would not agree to checkoff because it did not wish to incur the administrative expense and did not want to know the identity of those who were members of the Union so that it would have an additional defense in the case of an allegation of discrimination.

The parties then discussed their respective proposals on management rights. Diederich stated he objected to the Union's abbreviated statement because Respondent wanted its rights spelled out. The parties then discussed the rights enumerated in Respondent's proposal, mostly by repeating themselves. At one point Diederich asked if under the union proposal Respondent would have a right to subcontract; Miller replied that if there was no express prohibition Respondent could do so. Diederich replied that the Union should then have no objection to listing the rights which the Union acknowledged the Company possessed.

The parties discussed the Union's proposal submitted that day regarding grievance and arbitration procedures. The proposal contained a three-step grievance procedure culminating at a point at which the Union would have the right to force the issue to arbitration or go on strike. Diederich stated that Respondent did not want compulsory arbitration although it might agree in an individual case to arbitrate. Diederich added the Union should strike if it did not accept the Company's answers, again stating that such a provision would flush out frivolous grievances. Miller stated that the Union would look at having the right to strike without the right to arbitrate if there were no time limits. Diederich responded that there must be reasonable time limits; Miller stated that the Union wanted to be able to strike when the Company was ''busier than hell.''

The Union's proposal for grievance procedure and arbitration included a section which provided ''top seniority'' for the purposes of layoff and recall for department stewards, chief stewards, grievance committee members, and Local officers. Diederich states that such a proposal was not fair to other employees. Miller replied that when the members elect stewards they know what the result would be; Diederich responded that it still would not be fair because only members got to vote. Diederich further objected because there were at least 26 department stewards and officers and Respondent did not want to retain inferior employees during a layoff just because they held a union position.

Diederich stated that the Company had spent all the money it was going to spend and did not see any place to make movement in language.

Bargaining Session No. 39; April 30, 1981

The parties continued with the April 29 union proposals for grievance procedure and arbitration. Diederich limited first his general objections or ''highlights'': It had ''too many people'' at step 2 and step 3; he objected to the Union's having the option to strike or arbitrate; there was no time limit on the Union's right to strike; he objected to a monthly step 3 meeting because backpay could be running; and he objected to the Union's proposal that arbitration decisions be ''final and binding'' because he wanted the right court review. He further stated he objected to a lack of requirement that the article of the contract complained under be specified in the first step of the procedure; he wanted only one steward at the second step and not the chief steward and

department steward; at the third step he only wanted the chief steward and the union representative not the entire committee. In discussing the Union's proposal Miller asked Diederich why he objected to the number of employees being at a grievance meeting because, under the company proposal, they would be on nonworking time anyway. Diederich replied that if the Company agreed to the larger number of employees the Union would want more session ''and we are not going to let you get your nose under the tent.'' Diederich added that the Company was making a concess on by agreeing to have the chief steward as well as union representative at the third step because previously the Union had stated that the union representative would not meet with the company official alone. Diederich further stated that if the Company would agree to arbitrate a particular grievance voluntarily, he would want a clause that arbitrators cannot reduce discipline if cause for any discipline was shown. Miller replied that the contracting parties need to give arbitrators some latitude. The conversation shifted to Respondent grievance procedure proposal; Miller objected to Respondent's ''bringing in'' a no-lockout provision after 6 months of negotiation. Diederich stated that the matter had come up later (when the Union proposed no lock-out) so he brought it up at that time.

The parties moved next to seniority. Miller outlined the differences between the parties stating that the Union still wanted 60 days' maximum probationary period while the Company was still proposing 90; the Union wanted employees to be eligible for holiday pay after 30 calendar days, while Company proposed eligibility to be postponed until after 30 working days. The Company limited the period that seniority would be retained while on layoff of up to 12 months; the Union wanted seniority retained for 12 months for those employed less than a year and the length of employment up to 24 months for those employees employed for 1 year or more. The parties were further in disagreement on the length of the time that an employee could fail to call in without being discharged; the Company would allow 2 days and the Union wanted 3. The Union wanted layoffs to be by volunteers first and then probationary employees, then by seniority; the Company wanted layoffs by qualifications, then seniority. The Company wanted absolute discretion as to whom to choose for layoffs and recalls of less than 2 weeks; the Union would agree only to 2 days. The Respondent wanted the right to require employees to take vacation days during inventory shutdown (as well as summer shutdowns); the Union objected to the Company having that right.

At the meeting the Union dropped its demand for recognition of the Local but stated that the Union wanted NLRB unit placement decision on newly created positions to be final. Diederich disagreed stating that the Company wanted to maintain its right of review by the court of appeals in any contract because the NLRB is sometimes wrong.

Miller objected to Respondent's proposal that overtime be mandatory stating that employees could be excused. Diederich responded that if a supervisor excuses an employee then it is not ''scheduled'' overtime so there is no need for modification of Respondent's proposal. Diederich added that the Company would write in that if an employee is not ''scheduled'' if he has been excused. Miller again stated that the Union wanted equal distribution of overtime. Diederich responded that equal distribution of overtime was a ''grievance generator'' and that McCartin likes to call employees back to redo work if not done properly and that sometimes had to be on overtime. Miller stated he would still not agree to the Company's overtime proposal.

Miller stated that the Employer was trying to punish employees for selecting the Union; Diederich replied that he was trying to get precisely what the Company wanted and needed if it was going to be bound by a contract. Diederich added that Respondent's offer was the best it can make and the Union should sign the contract. Lambiase replied that the proposed contract was not good enough.

Bargaining Session No. 40; May 13, 1981

After a discussion of the suspensions of Bachtell, Sterud, and Lawson, the parties went to recognition. Diederich stated that the Company would drop its proposal to delete the position of senior receiving inspector from the unit description but wanted to keep language that would guarantee the right of the Company to seek review of any Board unit placement determination by the courts of appeals. Miller replied that the Company was offering nothing since the senior receiving inspector was already included in the unit.

Diederich stated that the Union had the Company's complete proposal and should sign it. Miller asked if the Company had looked at the Union's proposal on management's rights and scope of agreement. Diederich responded that he thought he had told Miller that the Union's management-rights proposal took out too much of what the Company had proposed by way of specific enumeration of management rights and that the scope of agreement clause did not state that the contract was a ''total agreement'' and did not provide for cases in which Respondent was required to comply with conciliation agreements.

The parties then went to discipline and discharge proposals. Miller stated that he could not agree with Respondent's Class A (immediate discharge) rules against moonlighting and being under the influence of drugs and alcohol. Miller also listed four Class B (progressive discipline) rules which the Union did not agree with. Diederich responded that the Company had not changed its position either. The parties further repeated their respective positions on progressive disciplinary procedures. Miller pointed out that in the Company's major medical proposal the Company had reduced the benefit from unlimited coverage to $250,000. Diederich responded that he would check on that and would correct the proposal if Miller was right about what was provided in the past. Miller stated that the Company had agreed not to require employees to take vacation during inventory shutdown, stating that the Company had agreed with the Union on January 9. Diederich replied that there had been no such agreement and his notes reflected that the Company had rejected the Union's proposal in that regard. (Diederich was correct.)

As the meeting drew to a close Diederich said that the Union could ''sell'' Respondent's proposal to the employees. Miller replied that the Union was not interested in ''selling'' anything that the employees could not live with. Diederich replied that the Union's ''bad mouthing'' of the Company's proposal verbally, and in the ''Eye Opener,'' had kept the parties apart. Miller responded that there could not be an agreement if the Company was insisting that grievances be handled on employees' time and that layoffs be by qualifications rather than seniority. Diederich repeated the reasons for Respondent's positions on that issue. Miller further stated

that Respondent's proposals for ''red circles'' actually constituted wage cuts. Diederich denied that any employee would get a wage cut and added that Miller's position was premised upon wage increases that have not been given because the Union had not ratified the contract and the Union was further speculating on future raises. Diederich added that the Company had to have a contract under which it could operate economically in order to compete with Korean, Japanese, and domestic manufacturers.

Respondent's April 9 plenary proposal provided that the contract would expire on February 5, 1982. Miller objected at this meeting that by its insistence on the date the Company was proposing for a contract which would expire in 9 months. Miller added that he had never heard of a contract of so short a period; Diederich said that it could be whatever the parties agree to.

Bargaining Session No. 41; May 14, 1981

At the beginning of the session Diederich asked Miller for an answer to Respondent's proposal to retain the senior receiver inspector classification if the Union would agree to court of appeals review of Board unit determinations for placement of new jobs. Miller asked where the senior receiver would be slotted; Diederich replied at grade 26; Miller replied that he could not agree because that position should remain at grade 27.

Diederich acknowledged that the $250,000 limitation on major medical insurance was an error and that Respondent would delete its proposed limitation. Miller stated that some of the other ''takeaways'' might also have been mistakes and the Company should change some of them. Diederich replied that if the Union could show other mistakes the Company would correct its proposals.

At this meeting Miller pointed out that other Litton companies had checkoff in their labor contracts. Diederich responded that that did not matter because Respondent did not know what unions at other Litton plants had given up in order to get contracts and pointed out that the Union was now negotiating for an initial contract. Miller asked who made the decision not to grant checkoff. Diederich replied that it was a local management decision based upon administrative costs which included modification of computer programs when there were dues changes as well as setting up programs.

The parties discussed grievance procedure. Miller stated that the Union has modified its proposal so that there would be third-step meetings within 5 working days of second-step answers on grievances which sought a monetary remedy; therefore, there should be an agreement on the grievance procedure proposal. Diederich replied that Miller had to be ''kidding'' because there were other objections to the Union's proposal, to wit: too many employees involved; grievances were to be discussed on working time; there would be superseniority for grievance committee members and union officer''; it gave the Union the option to strike or arbitrate; the chief steward could use the telephone at all times; Federal Mediation and Conciliation Service would be the source of arbitrators, not local arbitrators (assuming an arbitration proceeding was agreed to); and there was no management right to file grievance.'' Miller asked if that was all. Diederich responded that was all he could see at that point and that if the Union would agree the Company's position on all those issues then there could be an agreement on grievance procedure. Miller said he could not agree.

Diederich stated again that the Union should ''sell'' the Company's proposal to employees because some had loss $80 a month because there had been ratification; Lambiase replied that the Union did not sell agreements to employees.

Bargaining Session No. 42; May 28, 1981[89]

This was the first bargaining session attended by Kathy Laskowitz whom Miller described as a ''field organizer.'' Laskowitz was not called to testify.

Miller stated that he wanted to go through several of the ''takeaways'' again. The parties mostly repeated their respective positions. Diederich did add that the Union's request for two 15-minute breaks, rather than 10-minute breaks, for employees per day was the equivalent of five extra paid holidays.

Also, in discussing ''takeaways,'' Diederich argued that Respondent's accident and sickness program was not a ''takeaway'' from the prior sick day program; it was a ''trade off'' because employees who were sick for more than 3 days were better off although employees of shorter absences would not be; Diederich further stated that the proposed program would be an absence control program. Laskowitz said that it was totally regressive; Diederich responded that the program was similar to such a program in Minneapolis; therefore, it could not be too bad.[90] Diederich further repeated explanations of many of Respondent's proposals and the reasons for those proposals for the benefit of Laskowitz; for example, he explained that layoffs outside seniority were not the final decision of the supervisor and that the human resources department would review any such decision. Laskowitz stated that in may respects the Company was deviating from past practices, for example, the refusal to pay holiday pay to probationary employees. Diederich replied that the Company was now entering a legally binding contract and had reviewed many of its policies

In arguing that the Union should accept the Company's final positions on wages and language, Diederich stated that the employees were better off than they had been before; for example, they would have obtainable maximums, rather than only theoretical ones, for each labor grade. Diederich further stated that the Respondent's proposal would result in the best employment package in the Sioux Falls area. Miller responded that the wage package was inadequate and Respondent's profits were good and should it be paying more. Diederich replied that profits were not the issue and that with the wages that Respondent was paying it gets up to 80 or 90 applications a day when jobs are available. Miller replied that he had never heard such an argument before.

Diederich concluded that the Union did not seem to be able to understand that the Company had the right to get an

[89] The Union had brought some observers to bargaining session No, 41. Diederick claimed that there had been some disruption caused by those observers. A bargaining session had been scheduled for May 27, and the parties did meet on that date. However, Respondent's representatives walked out of the meeting when the Union insisted that other observers be allowed to attend the meeting. Neither General Counsel nor Charging Party contends that this walkout is evidence of bad faith.

[90] There is no substantiation for Diederich's assertion that there was any such program in Minneapolis; the contract that Minneapolis was received in evidence and there is no mention of it therein, and was attempting to eliminate the inefficient ones.

agreement it feels it could live with.[91] Diederich concluded by saying that the Company had spent all the money it was going to spend and saw no room for movement on language and that the Union should call the Company when it wanted to meet again.

Miller asked where McCartin and Ori were; Diederich responded that there was no point in having them there for repetitive bargaining sessions and that they would be called in if needed.

On cross-examination Miller was asked if the Union as of this bargaining session was still insisting on a termination date as the same in Minneapolis. Miller replied that the Union had been verbally proposing a 2-year contract from February 1, 1981, to February 1, 1983, with retroactive wage increases and a wage increase on February 1, 1982. Miller acknowledged that the Union never made a written proposal of such a termination date; the only written proposal the Union made for a termination date was that it be the same as it was in Minneapolis, October 31, 1982. Miller stated that when the Union made a wage proposal on March 25 he verbally stated that the Union was proposing a 2-year contract; that Diederich asked if the Union was ''off'' the Minneapolis termination date demand; and that he replied ''yes.'' This testimony was false. A 2-year duration proposal was not mentioned in the direct or cross-examination of Miller when he was testifying about the March 25, 1981 bargaining session. In fact, Miller, when testifying about the March 25 bargaining session stated (at Tr. 4062 and 4067) that the Union was proposing a termination date of October 31, 1982. Accordingly, I find that the only termination date proposed by the Union was October 31, 1982.

Bargaining Session No. 43; June 24, 1981

At the beginning of the meeting the parties discussed the discharges of Bachtell, Lawson, and Sterud. The Union further complained that employees working overtime had been denied breaks during the overtime period. Diederich gave a preliminary answer and then said he would have the matter checked into. Telephone calls were made and Diederich gave a further response to the Union's complaint later in the meeting.

Miller stated that he thought the Company was going to respond that day to union proposals on wages and other matters. Diederich replied that he was not responsible for the Union's impressions; he had tried to give them reasons for his positions and his positions were reasonable; the Union's proposals for a wage increases of up to $2, voluntary overtime, and other proposals were ridiculous.

Miller stated that he had heard there was a new machine being installed at the plant. According to credible testimony of Diederich:

> Mr. Miller said that he wanted to come in and see that machine in operation, and I said ''fine.'' Mr. Miller said, ''While I'm there, I'd like to see those other machines that we previously requested to see, and you wouldn't let us in to see.'' I said, ''Wait a minute, Joe. You never requested to come in and see any machines. You made some general comments from time to time that you'd like to see the plant or tour the plant or see a machine or something like that, but you certainly never made any comments that you wanted to come in and see a machine or any request to come in and see a machine.'' Mr. Miller said, ''Yes, I did.'' He had made a request to come in and tour the plant, and that I had told him, ''no,'' that he couldn't come in and tour the plant because there would be disruptions, and snake dancing, and I said, ''No, Joe. I think that discussion was when we were talking about the language on the plant tour. I never told you that you couldn't come in and tour the plant.'' Mr. Miller, again, said, ''Yes, you did.'' I said, ''No, I didn't.'' And I said, ''Look, Joe. When you make just a general comment that you like to see something or you'd like to do something, that, to me, is not a specific request. If you want to come in and take a plant tour, we've got no objection to it, but you make a specific request.'' Mr. Miller said, ''All right. Fine. We'll make a formal written request.'' I said, ''O.K. Fine. You do that and you'll get your plant tour.''

Virag further testified that Diederich's statements were in response to Miller saying he would ''like to have Kathy and I come in and observe'' the striping machine.

Bargaining Session No. 44; June 25, 1981

At the beginning of this session Diederch further explained Respondent's policy of granting breaks to individual employees, rather than entire shifts, who were required to work overtime.

The only substantive contract provisions discussed at this meeting were that Miller proposed that employees could only be required to work overtime when operational needs required and he continued in his proposal for equalization of overtime. Diederich stated that Respondent did not wish to have to prove its operational needs when it told an employee to work overtime and he repeated his reasons previously given for not agreeing to a proposal for equal distribution of overtime (bookkeeping burdens and potential for grievances).

The remainder of the session was spent in the Union's accusing Respondent of bargaining in bad faith and requesting further information which Virag promised to provide.

Bargaining Session No. 45; July 21, 1981

At the beginning of the meeting Diederich told Miller that because McCartin wanted any tours by union representatives at the end of the day he proposed that Miller or Laskowitz with Chuck Eisenhauer tour the plant the coming Friday, July 24, at 3 p.m. Miller said he would get back to Diederich on the proposed time. The Union submitted an additional wage proposal reducing the top rate for each classification by 10 cents per hour and calling for February 1 and April 1, 1981 increases paid retroactively. Diederich repeated that there would be no retroactive payment of wages and the Union request was still too high as the Company could get all the employees at the rates it was proposing. Diederich further said the Company had no more money to spend as part of an economic package and that the Company proposed to institute its last proposal, unless an different rate was negotiated, on August 3. Miller responded that the parties were only 45 cents apart for some classifications and should con-

[91] I find that this statement was made rather than that, as Miller testified, Diederich stated that ''you can't seem to grasp that you are not going to get a contract except on the terms that we want it.''

tinue negotiation. Diederich pointed out that 45 cents was a lot of money for employees who were basically making $4 per hour.

During the meeting the Union, by employee Eisenhauer, objected again to the accident and sickness program which paid nothing for the first 3 days of an illness. Diederich acknowledged that employees would ''lose out'' on the 1 or 2 days' absences. He added that Respondent had been informed that there were going to be insurance increases effective August 1, and to compensate for the increases and the modification of the sick day program Respondent proposed to raise its contribution for health insurance from 76/24 percent to 87/13 percent for a family coverage which would reduce the employee contribution from $35 to $18 under the new rate and that employee-only coverage would remain at zero.

Miller requested that the Company state in writing what portions of its last offer it intended to place in effect on August 3, 1981. Diederich agreed to do so.

Bargaining Session No. 46; July 22, 1981

At the beginning of the meeting Diederich submitted written statements of Respondent's intentions regarding what would be done on August 3, 1981. The statements represented that Respondent would put in effect its wage proposal of April 9, but no decision had been made on the balance of that proposal ''including the elimination of 12 sick days, the substitution of an accident and sickness policy, and the entire insurance proposal, absent a contract ratification by August 3, 1981.'' The document further stated that Respondent would pass along the increase in hospitalization insurance premiums and the ratio of 76 percent paid by the Company and the remainder by the employee for family coverage and nothing for employee coverage. The document further stated that if the contract was ratified before August 3 the Company would pay the entire cost of employee-only health coverage. If the contract proposal was ratified after August 3, the Company will still pay the 87 percent for the family coverage but employees would pay 73 cents for employee-only coverage.

At one point in the meeting Laskowitz stated that the Company was bargaining in bad faith because it had been offering an 8-month contract and now, by sticking to the same termination date, the Company was offering a 6-month contract. Diederich responded that it may be down to 1 month if the Union did not get serious.

Miller stated that he and Laskowitz wanted to tour the plant at the same time. Diederich responded that it would have to be one or the other. Miller stated that the two union representatives have different experience. Diederich said they would have to alternate; Miller agreed.

Bargaining Session No. 47; July 30, 1981

After the Company furnished information previously requested by the Union and the Union asked for more, the parties discussed a tour. Laskowitz stated she wanted to take a tour on the following Monday morning and it would take all day. Diederich replied that it should not take more than an hour and if it took more the Union could schedule another tour subsequently; Diederich added that McCartin wanted the tour on Friday because by the end of the week all production meetings would be over and problems should be ironed out. Miller stated that the Union did not want an escort, but Diederich insisted that all visitors had to have one. Laskowitz stated that an escort would be good for her to have. Laskowitz agreed to 2:30 p.m. on the following Friday. (There is no testimony that the length of time granted by the Company for the tour was inadequate.)

Laskowitz stated that Respondent's proposing a contract of less than a year's duration was illegal. Diederich responded that the Union would have an opportunity to prove such claims in court. Other accusations of bad faith were made by the Union and responded to, or not, by Diederich.

The Union objected again to Respondent's proposed accident and sickness program and refusal to agree to equal distribution of overtime provisions, and Diederich gave the same answers he had given before.

At this meeting Miller reintroduced the issue of recognition of the Local stating that the Union wanted recognition granted in the contract; Diederich repeated his reasons for refusing to recognize the Local.

Diederich told the Union (again) that it had Respondent's final offer and what it was doing was an attempt to get what it took other unions 30 years to get. Laskowitz made more accusations of bad faith on the part of Respondent, for example, not ''pleading poverty'' and refusing to grant wage increases requested by the Union. Diederich responded that it had thousands of applications for its jobs and those applicants were willing to accept the paying conditions offered by Respondent.

Bargaining Session No. 48; September 1, 1981

Laskowitz and Lambiase took over as spokepersons for the Union; Miller was absent from this meeting and did not reappear until the last (53rd) meeting on February 19, 1982. Laskowitz, as noted, did not testify, and Lambiase did not testify about these meetings. Therefore Diederich's testimony regarding this meeting, and the following four meetings, is undisputed.

Most of the bargaining session was consumed by Laskowitz' making allegations of bad-faith bargaining by the Company and requesting more information. Laskowitz further stated that the Union wanted to have inserted a clause that probationary employees could not be discharged unless it was for a just cause. Diederich objected that Miller had already agreed that probationary employees could be discharged for any reason.

Several of the substantive provisions of Respondent's proposals were discussed, Diederich repeating the reasons he had previously given to Miller for each.

Bargaining Session No. 49; September 2, 1981

Laskowitz and Lambiase acted as spokespersons for the Union. Diederich asked Laskowitz if the Union were backing out of its own proposal that the Company could discharge probationary employees for any reason without recourse of the grievance procedure. Laskowitz replied that since the parties had never reached final agreement on the contract, the Union had a right to change its position.

The remainder of the meeting was consumed with Laskowitz' making allegations of bad faith on the part of the Company and Diederich repeating to Laskowitz what he had told Miller as the basis of Respondent's positions to which the Union objected.

Bargaining Session No. 50; November 10, 1981

After discussion of various types of information requested and supplied, and another request for information by Laskowitz, Laskowitz asked if the Company adhered to its position on duration. Diederich stated that the Company was disinclined to change its positions since the Union had announced that it was attempting to coordinate its bargaining with other Litton divisions and Respondent did not want simultaneous termination dates of various contracts.

The remainder of the meeting was consumed in more allegations of bad faith made by Laskowitz.

Bargaining Session No. 51; January 21, 1982

Laskowitz was absent; Lambiase acted as chief spokesperson for the Union and was accompanied by her husband, John, who was also a field organizer for the Union.

Diederich stated that the Company was then proposing that the termination of the contract be February 6, 1983; that all wage rates be increased by 15 cents on August 1, 1982. John Lambiase replied that the wage offer was inadequate and that Respondent was make great profits and should pay higher wages. Ken Allen (another union representative present) and John and Carol Lambiase requested tours of the plant; Diederich agreed to begin scheduling tours for these individuals the following Friday at 2:30 p.m.

Bargaining Session No. 52; February 11, 1982

John and Carol Lambiase again represented the Union. Diederich stated that since the Company had offered to extend the contract and offer a wage increase on August 1, 1982, he expected a response from the Union. John Lambiase asked if the Union settled for 16 cents instead of 15 cents, as Respondent offered in the previous session, would there be an agreement. Diederich replied that there might. Lambiase asked if there could be an agreement if the Union asked for 17 rather than 16 cents. At that point Diederich, apparently sensing that Lambiase was not serious, did not give a responsive answer. Nothing else was accomplished at this meeting.

Bargaining Session No. 53; February 19, 1982

Miller reappeared as chief spokesperson for the Union. Miller stated that there were some 50 issues separating the parties and he wanted to discuss them. Various differences in contract language were discussed with the exchanges being essentially repetitive of what had gone on before.

Miller proposed that all employees immediately receive a $1.50 wage increase; Diederich refused. Diederich informed the Union that there would be an inventory shutdown in March 1982, but employees would not be required to take vacations during that shutdown. (The Company's position remained the same on requiring employees to take vacations during the summer shutdown.)

Miller against asked why the Company would not agree to checkoffs; Diederich replied that the Company did not wish to incur the administrative costs.

c. *Conclusions*

(l) Employer conduct

The Act forbids the Board from specifying what contractual terms must be agreed to as a test of whether a party has bargained in good faith.[92] But this statutory provision does not mean that a party complies with its bargaining obligation by attending bargaining sessions only for the purpose of saying ''no'' to the other party's proposals, and requiring a ''yes'' response to its own. ''Good faith'' under Section 8(d) of the Act necessarily includes a duty ''to enter into discussions with a open and fair mind, and a sincere purpose to find a basis of agreement.'' *NLRB v. Herman Sausage Co.*, 275 F.2d 299, 231 (5th Cir. 1960). To determine if this duty has been assumed by a party, the Board necessarily looks at the substance of the proposals themselves for ''if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the position taken by an employer in the course of bargaining negotiations.'' *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953) cert. denied 346 U.S. 887.

While the Board will not mandate what terms of a permissible subject of bargaining must be reached, it does determine if the terms, individually or collectively, are so harsh as to be predictably unacceptable. *Pease Co. v. NLRB,* 666 F.2d 1044 (6th Cir. 1981). Even if an insisted-upon position does not fall within the category of the ''predictably unacceptable,'' if it is taken for reasons which are nonexistent or demonstrably false, the Board and the Courts will find that the position has been taken in bad faith. *NLRB v. Reed & Prince Mfg. Co.*, supra. Therefore, the positions and the stated reasons for taking them must be examined to determine if an employer, or union,[93] has refused to bargain on any particular topic or has engaged in an overall pattern of conduct designed to avert, rather than comply with, the obligations of the statute.

One obligation not included in the statutory obligation is a duty to make a concession just because the concession has been made in the past. An employer is not required to make the concession of continuing a past practice just because the employees or the Union representing them wants it continued. Similarly, absent a ''most favored nations'' agreement, a union is not compelled to make concession to an employer because just it has made the desired concession to another employer.

In this case, although there was a great deal of evidence introduced to show that the Respondent had made concessions to the Sioux Falls employees before representation by the Union (in its employee handbook or otherwise), or that Respondent had made concessions to the Minneapolis employees in the past (like checkoff), it was not bound by such facts to make the same concessions to the Charging Party in these negotiations. Likewise, although the Union had made

[92] Sec. 8(d) of the Act provides that the bargaining obligation ''does not compel either party to agree to a proposal or require the making of a concession . . . .''

[93] The duty to bargain imposed upon a labor organization by Sec. 8(b)(3) is the same as that imposed upon employers under Sec. 8(a)(5). *National Maritime Union (Texas Co.),* 78 NLRB 971, 980 (1948).

certain concessions in Minneapolis, and at other employers (like Mastic) it was not bound to make the same concessions in these negotiations. There are good reasons for this: in addition to the clear language of Section 8(d), a union or company may have agreed to certain provisions because of an erosion of bargaining power by the end of a long and injurious strike; or a concession may have been made elsewhere, or at a different time, because of a trade-off which could never be explained in subsequent bargaining (or proved in later litigation), or because of other economic circumstances different from those at hand.

In sum, while the evidence of past practices at this plant was relevant to determine if unilateral actions (as discussed later) were taken, contractual concessions made by Respondent at the Minneapolis plant, and by the Union at the plants of other employers, are only of tangential relevancy.

(a) *Management rights*

In the recent case of *Chevron Chemical Co.*, 261 NLRB 44 (1982), throughout negotiations the employer proposed and insisted upon a management-rights clause reserving the following prerogatives: determination of starting and quitting times, the number of hours and shifts to be worked, the establishment and elimination of job classifications, the modification or changing of work rules, the assignment of duties to employees and employees to jobs, the right to hire, demote, layoff, recall, and transfer employees, and the unlimited right to discharge, demote, and discipline employees. The union objected to the retention of each of these rights, but the only modification the employer made was that discipline and discharges could be made the subject of binding arbitration. This concession was made at the end of negotiations, and the employer persevered in a refusal to agree to arbitration of any other issue and insisted on a broad no-strike clause.

The Board reviewed these proposals and contrasted them with the limited management-rights proposals made by the union therein. The Board found that Respondent was entitled to insist on the managements-rights proposals which is essentially congruent with that demanded by Respondent herein, and noted that both parties appeared to be engaging in hard bargaining, rather than surface bargaining, on the issue of managements rights.

General Counsel had a stronger case in on the management-rights issue *Chevron Chemical* than he does here. At least there, the union objected to the retention of the rights by management; here, the only objection posed by Miller was that the enumeration of rights insisted upon by Respondent was that it was repetitive. Without objection by the Union, Respondent's good faith could not have been tested. Moreover, unlike *Chevron Chemical* Respondent herein did not insist that the Union forgo completely its right to strike over the exercises of the reserved management rights. Although the right to strike was severely limited by the time limitations demanded by Respondent, there was still more of a right to strike than was left to the union in *Chevron Chemical*, which was none.

Accordingly, I reject the contentions of General Counsel and Charging Party that Respondent bargained in bad faith on the issue of management rights.

(b) *Scope of agreement or ''zipper'' clause*

Respondent proposed its scope of agreement clause (or ''zipper'') on January 9 and thereafter made no modification to this proposal despite repeated objections by the Union. The bulk of the clause is a zipper clause of the type that has been reviewed by the courts and the Board in many cases; however, Respondent's proposal additionally contained an unprecedented provision:

> Section 2. Should any authority determine that the provisions of Section 1, above are not sufficiently specific or legal to constitute a waiver of any claim or right by one of the parties, then the party asserting such claim or right, upon the written request of the other party, shall execute and deliver to such other party a specific written waiver of the claim or right asserted.

Assuming that ''any claim or right'' did not include those granted by the contract, it would still force a party not only to abandon all rights to negotiate, but other rights guaranteed by the Act (such as the right to demand information necessary to process grievances) and rights under other Federal or state statutes. That is, as Diederich explained the clause,[94] any demand premised on any statute could be met with a request for a waiver of the rights which purportedly justified that demand; under Respondent's section 2 of its zipper clause, the waiver would have to be given. Respondent's insistence upon this provision was a per se violation of the Act.

(c) *Checkoff*

While the Supreme Court in *NLRB v. H. R. Porter Co.*, 397 U.S. 99 (1970), held that the Act does not empower the Board or the courts to order an employer to agree to a checkoff proposal as a remedy for a refusal to bargain on the issue of checkoff, it did not disturb the many cases which hold that an employer can be held in bad faith for its negotiations on the checkoff issue. As is the case on any other issue, where a position is predicated on reasons which are demonstrably false, the Board and the courts will find that bargaining on the issue in question was conducted in bad faith.[95]

The reasons given to the Union by Diederich at the December 11, 1980 bargaining session, and repeated many times thereafter, were: (1) checkoff was ''union business''; (2) Respondent did not wish to incur the administrative costs involved; (3) employees look at their ''net pay'' which would be reduced by checkoff; and (4) in the event Respondent was charged with discrimination under the Act, it wanted to be able to invoke the defense of lack of knowledge of union membership or activity. Furthermore, Diederich added at the December 11 session, if Respondent was not going to agree to checkoff, it felt it needed a rule prohibiting any attempt by employees to collect dues on working time.

---

[94] Diederich testified:

> what I had in mind working was the normal case when the matter comes up in collective bargaining. One side says we've got a zipper clause. The case goes up to the Board and the Board says the zipper clause isn't clear enough, concise enough, it's inadequate. Then, in that case, the other party who was claiming the benefit of this zipper clause would have the right to go to the other party and say ''we would like a clear, concise waiver from you of this item.''

[95] *NLRB v. Reed & Prince Mfg. Co.*, supra.

Diederich's early demand for the rule against collection of dues, if anything, shows a closed mind on the issue of checkoff. He was announcing that Respondent's position was already so well fixed that the only way dues could be collected was by the unilateral effort of the Union, and those efforts would be met with punishment if made during working time. That is, Respondent was announcing an inflexible position, and it maintained that position throughout negotiations.

The reasons given by Diederich for Respondent's position were nothing short of sham. The ''union business'' excuse was precisely the one before the Court in *H. K. Porter*, where the employer was found in violation of the law for its stance, and nothing more need be said of such an excuse.

The administrative costs were never estimated by Respondent, but they necessarily would have negligible. The employees' paychecks were issued by Respondent's Minneapolis office. Not only did they contain deductions for such matters as stocks, bonds, credit union, and ''other,'' they contained a designated space for the deduction of ''union'' dues.[96] Furthermore, Virag testified that the offices at the Minneapolis plant contained a complete accounting department, including systems analysts, programmers, and computer operators. Therefore, the costs incurred as the paychecks were issued by the Minneapolis computers could not have been a serious consideration held by Respondent. While Diederich told Miller at the February 11, 1981 session that changes in the amounts of the deductions will cause additional work for the Sioux Falls keypunch operator, or even require the hiring of a new keypunch operator, it is to be noted that Respondent hires as many as 100 employees a day; and 1 more employee added to the complement of over 700 would not be a significant burden. That is, absent evidence that a checkoff program would even be noticeable, in comparison to the other programs involved in the many other voluntary deductions from employee paychecks, Respondent's contention that costs were a factor in its position is simply unbelievable.

Diederich's argument that Respondent was not agreeing to checkoff because employees look at their ''net pay'' was patently frivolous. Employees would not blame Respondent for the difference made by their agreeing to the deduction of union dues, anymore than they would blame Respondent for deductions made payable to the credit union.

Finally, Diederich argued that Respondent did not want to be charged with knowledge of who union supporters were. That is, Respondent was refusing to consider checkoff because it wished to maintain a theoretical defense to a theoretical charge. The employment of such a sham demonstrates that Respondent was not approaching the issue of bargaining in good faith. If employers, even employers who had been charged with discrimination in violation of Section 8(a)(3), can assert this ''reason'' as a basis for refusing to consider checkoff, the institution of checkoff is at an end.

Accordingly, I find and conclude that Respondent refused to bagain on the issue of checkoff.

[96] The refusal to allow a deduction for union dues, while permitting deductions for other purposes, was held to be evidence of bad faith in *Farmers Co-Operative Gin Assn.*, 161 NLRB 887 (1966).

(d) *Absence control program*

Respondent's absence control program as originally proposed on April 9, 1981, rather than being a ''no fault'' system was actually an ''all fault'' program under which any grievance would be unwinable. Grievances were unwinable because the system contained no safeguards of recordkeeping and allowed the Respondent to impose the ultimate discipline, or no discipline, on employees who accumulated six points in 26 weeks. The modifications contained in the April 16 proposal included a review of any supervisor's discipline under the system by higher management if the employee so requested. Nevertheless, if an employee was absent in January, it could be used against him in June. With no recordkeeping safeguards, the employee's memory would be pitted against the supervisor's memory or notes as to the actual and stated reasons for the January absence. Assuming a good-faith review by higher management, it can only be supposed that management would logically take the side of the supervisor. Therefore, the review included in the April 16 proposal was actually meaningless. Diederich was asked on cross-examination how the Union could win a grievance of an employee disciplined under the absence control program. Diederich replied that the Union could win by showing discriminatory treatment. However, an allegation of discriminatory treatment would necessarily be defeated by the option contained in the April 16 proposal to dispense different, or no, discipline for the accumulation of six points in 26 weeks. That is, Respondent, under its absence control proposal, was guaranteed the right to be completely arbitrary and unfair in its treatment of any employee who accumulated points under the ''no fault'' system.

Respondent adamantly insisted upon its absence control program from the day it was proposed to the end of negotiations. Insistence upon provisions which are unnecessarily unworkable or which can only work to the detriment of the employees is evidence of bad faith. At minimum, the absence control program was in the category of ''unusually harsh, vindictive, or unreasonable proposals [which] may be deemed so predictably unacceptable as to warrant the evidentiary conclusion that they have been proffered in bad faith.'' *Chevron Chemical Co.*, supra at footnote 9 of the Board's decision, citing *Pease Co. v. NLRB*, 666 F.2d 1044 (6th Cir. 1981). Accordingly, I find and conclude that Respondent's insistence on its ''no fault'' absence control program is further evidence of bad faith.

(e) *Holidays*

Charging Party contends that Respondent's tactics and positions on the issues raised during the discussions of holidays demonstrates bad faith. The Union refers to Respondent's insistence on the right to change the celebration of holidays which fell on Saturdays or Sundays to days other than the preceding Friday or following Monday and the Company's refusal to agree to designation of the floater holiday by mutual consent.

Respondent's November 18 proposal cryptically stated: ''Saturday-Sunday, celebrate on Friday-Monday.'' However, Respondent's January 9 proposal stated that Saturday and Sunday holidays would normally be celebrated on Friday or Monday but, ''the Company shall have the right to schedule holidays falling on a Saturday or Sunday on some other

day.'' This last clause Charging Party calls a ''regression'' from the November 18 proposal. I disagree. In the first place, the November 18 proposal, like the October 7 proposal of the Union, was only a general statement and it contained no prohibition against celebrations of Saturday or Sunday holidays on other days. Furthermore, Respondent made movement on its proposal after entertaining objections from the Union; its April 9 proposal stated that changes would be made to maximize efficiency or satisfy operational or customer needs and would be done only after discussion with the Union and that Respondent ''would give as much notice as possible of any change. While this last proposal was not the broad limitation on the right to reschedule Saturday or Sunday holidays which the Union sought to make out of the generalized proposal of November 18, it is hardly a ''regression'' of the type viewed by the Board in other cases as a device to frustrate agreement. Moreover, Respondent gave the Union reasons for its position during the ''chicken-and-egg'' discussions; it wanted to consider customer needs before the plans and conveniences of employees.

The Union's brief further contends that Respondent's refusal to agree to the designation of the floating holiday by mutual consent is evidence of bad faith. It is true that Respondent did not agree to the designation by mutual consent, but it is not required to enter into such an agreement under Section 8(d) of the Act. All that is required is that it negotiate in good faith over the issue. Respondent's movement from a complete, unilateral right to designate the floater, to designating it as early as possible each year, to designating it by March 5 of each year, to a proposal to designate holidays within 30 days of celebration and to discuss the designation if it were to be other than at the Christmas-New Years period, reflects serious consideration of the Union's objections and at least some attempt at compromise.

Accordingly, I find and conclude that the evidence of Respondent's bargaining on the issue of holidays does not demonstrate bad faith.

(f) *Grievance procedure and arbitration*

I do not believe Respondent negotiated in bad faith over the issues of grievance procedure and arbitration. While Respondent held to certain positions expressed the first time grievances and arbitration were discussed it cannot be said that the positions were without real bases and taken only to avert agreement.

Respondent's refusal to entertain or allow investigation of grievances on working time was, in essence, a position that it would not pay for activity other than work. While payment for such time is quite common, it is still an economic term over which Respondent is not required to yield. The fact that Respondent did not change its position on the issue is no more determinative than would be a refusal to pay for other nonwork employee activity, such as paid lunch breaks or pay while on leave of absence.[97]

Contrary to the contention of Charging Party, Respondent's insistence on a narrow definition of grievances is hardly evidence of bad faith since the Union's first and last proposal was:

> A grievance is defined to be any difference between the Company and the Union or an employee concerning the interpretation and/or application of any provision(s) of this agreement.

That is, there is no material difference in the definition proposed by the Union.

Respondent's refusal to agree to the size of the Union's representation committees at various stages of the grievance procedure is not evidence of bad faith. Although on paper the Union's later proposals included only two union members at the second step and three at the third, Miller made it clear each time the matter was discussed that the Union envisioned more persons present for the Union at the third step. Diederich's estimation that as many as seven employees could be present for the Union at the third step was never challenged by Miller. Therefore, the Union wanted two more employees at the second step and as many as six more employees at the third step than Respondent was willing to agree to. The number and identities of the union representatives at various stages of the grievance procedure is a mandatory subject of bargaining[98] so Respondent could insist to impasse on the issue.[99] While Respondent only made one concession (adding chief steward at the third step), the Union made none. Moreover, Respondent's reason, that there were ''too many people'' involved in the Union's proposals, is not so patently frivolous as to conclude it was taken in bad faith.

Nor do I find evidence of bad faith in Respondent's refusal to agree to monthly third-step meetings, or its insistence on identification in the first step of the section of the contract grieved over. The Union insisted on monthly third-step meetings solely for the convenience of Joe Miller who lived in Minneapolis; where its representative resided was the Union's problem, not Respondent's. The demand for contract-section identification was not burdensome to the Union; if its steward was in doubt, he could have consulted with the Union or listed multiple sections of the contract to make sure he got the right one.

In its brief, the Union argues that, as a regressive tactic, Diederich first agreed to arbitration, then reneged. This is not correct. Diederich at all times premised his discussion of arbitration procedures and limitations upon arbitrators in the hypothetical; first, he stated what he would want in a compulsory arbitration clause if he did agree to compulsory arbitration; then, after announcing that Respondent would not agree to compulsory arbitration, Diederich stated what Respondent wanted as qualifications for, and restrictions upon, arbitrators should Respondent agree to arbitrate a given grievance on a voluntary basis. Diederich never insisted on engaging in either of these hypothetical discussions; the Union was free to refuse to discuss qualifications of arbitrators and procedures for arbitration until Respondent, at least in principle, agreed to compulsory arbitration. But the Union did not refuse to engage in such discussions; it continued the discussions and, at the same time, continued its demand for the right to strike or arbitrate, at its own election. While doing Miller expressly acknowledged that he and his Union had distinct misgivings about the usefulness of compulsory arbitration. In this posture, neither the refusal of Respondent

[97] Pay for grievance-handling was refused by the employer in *Chevron Chemical Corp.*, supra, where the Board dismissed the complaint.

[98] *Brunswick Corp.*, 146 NLRB 1474 (1964).

[99] *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

to agree to arbitration, nor its attempt to negotiate qualifications for arbitrators, and procedures for voluntary arbitration, can be said to have been taken in bad faith.

The Union argues that Respondent unlawfully insisted that the Union have only an unreasonably short period of time to exercise its right to strike over unresolved grievances. Ultimately, Respondent proposed that notice of intent to strike be given within 10 days from the third step answer, then any strike had to be initiated within 10 days of such notice or the grievance would be deemed to be dropped. While the Union may have considered this period unreasonably short, it stood fast on a proposal of an unlimited right to strike. In this posture Respondent's refusal to agree to the Union's unlimited right-to-strike proposal, or compulsory arbitration, cannot be said to have been taken in bad faith.

Finally, the Union argues that Respondent demonstrated bad faith by its insistance upon the right to file grievances and the right to lockout employees if its grievances went unresolved. Specifically the Union alleges that Respondent is guilty of bad faith because its proposed right to lockout employees was broader than the Union's right to strike which Respondent proposed. In support of this last argument, the Union states at its brief, page 120:

> Section 5 also gave Litton the right to lockout bargaining unit employees on a broader basis than it proposed to give the Union the right to strike. Litton would lockout employees if their grievance is ''not settled in a manner satisfactory to the Company, or is denied or deemed denied'' whereas the Union's right to strike was limited only to where the Union is not satisfied with the *answer* given by the Company.

I disagree that Respondent's rights are broader than the Union's under this proposed clause. The failure to answer within the time limit prescribed would be an ''answer'' (in the negative) and would be treated as such by the Union or my court in a Section 301 unit. Therefore, contrary to the interpretation advanced by Charging Party, the Union would not be restrained from striking if the Company ignored a grievance rather than answered it in writing. Even if there is a difference between the proposed right to strike and the proposed right to lockout, there is no authority for the proposition that an employer cannot insist upon a right to file grievances or a right to lockout employees even if the right to lockout is broader than any right to strike.

(g) *Seniority*

The Union's primary objection to Respondent's bargaining on the subject of seniority lies in Respondent's refusal to consider plantwide seniority paramount to other factors when it came to layoffs and recalls and the staffing of new shifts. In contending that Respondent's position was taken in bad faith, the only argument the Charging Party makes is that by using seniority as the first and determining factor, ''the Union could be assured that the employees would not be subjected to disparate treatment based upon the level of union activity or involvement . . . .[100]

This is no argument; assuming a need for protection against discrimination (in addition to the avenue of filing charges with the Board), it will not be found in forcing employers to agree to controlling plantwide seniority. That is, the Union could and did offer no cogent reason for its insistence on plantwide seniority as a determining factor in cases of layoff, recall, and shift-staffing, but the Company could and did offer a business reason which the Union does not question (the desire to keep and utilize the best qualified employees). While the nine factors originally proposed by Respondent were somewhat redundant, they were ultimately reduced to four after entertainment of the Union's objections. Moreover, in an effort to further answer Union's objections Respondent offered to have layoff selections out of the line of seniority reviewed by the manager of the human resources department and further included a provision in the seniority proposals that layoff and recall selections are specifically subject to the proposed grievance-strike provisions of Respondent's proposed contract.[101]

Other seniority issues were the length of the probationary period and whether 2 days or 2 weeks would be the period for which Respondent could select employees for layoffs and recalls without any reference to seniority. The only argument made by Charging Party that the bargaining over the length of the probationary period demonstrated bad faith is that Diederich originally proposed a 90-workday probationary period and represented that to be the past practice. Diederich was in error: however, in addition to the fact that Virag told the negotiators at the second session that the past practice was a 90-calendar day period, the employees at the bargaining table presumably knew how long their probationary periods had been, and Miller did not question Diederich's representation as to the past practice. Diederich was apparently corrected by Virag, not Miller, before the submission of Respondent's first complete contract proposal on January 8 (the 15th session) and no delay in the bargaining process can be fairly attributed to Diederich's error.

Neither party compromised in their respective proposals for the period of ''temporary'' or ''discretionary'' layoffs or recalls. Respondent always insisted on a period of 2 weeks; the Union would agree to no more than 2 days. At all meetings in which the issue was discussed, Diederich insisted that: (1) the 2-week period was necessary because it took that long to retrain employees who might be transferred to different jobs that they might ''bump'' into; and (2) the evaluation processes required for longer layoffs are just not worth the disruption for shorter layoffs. While a 2-week period might seem more than necessary to retrain employees who did mostly routinized work, the Union never questioned Diederich's reasoning. Moreover, the Union never budged from its proposal that discretionary layoffs or recalls could be no more than 2 days in length. In this posture, it cannot be said that Respondent's insistence on a 2-week period for discretionary layoffs and recalls is evidence of bad faith.

Charging Party contends that Respondent bargained in bad faith on the issue of what conduct or criteria would divest employees of seniority rights. Ultimately, the parties were apart on only two criteria: the length of recall rights for employees employed in excess of a year and how long an employee could fail to report his absence before losing seniority rights. On the first issue Respondent limited recall rights of

[100] Union Br. at p.112.

[101] These reviews distinguish this situation from that in *Flambeau Plastics Corp.*, 167 NLRB 735 (1967), the only case cited by Charging Party in its argument that Respondent bargained in bad faith on the issue of seniority.

all laid-off employees to 12 months; the Union insisted on 24 months for employees employed over a year. Charging Party advances no argument as to why the Board should conclude that Respondent's position was taken in bad faith. The 12-month period was what the employees had before certification and Respondent simply was not willing to extend it; this was not bad faith. Also, if bad faith could be attributed to either party on the loss of seniority issue, it should be to the Union's obdurate refusal to agree that an employee who failed to call in within 2 days, unless physically unable to do so, lost his seniority, as Respondent proposed. Time and time again Diederich asked Miller if he could give any reason why an employee should be permitted even 1 day to call in and state the reason he was absent, if the employee was able to do so. Miller was never able to give a reason: he could only state that the employee handbook had previously granted 3 days. Respondent was not bound to all its prior practices merely because the employees had elected the Union, especially the ones which made no sense and should have been eliminated anyway for the reasons stated by Diederich. Diederich explained time and again to Miller the problems that occurred when employees failed to call in for 1 day; the Union's attempt to require Respondent to permit 3 days was simply illogical. At minimum, Respondent was not bargaining in bad faith on this issue.

Charging Party and General Counsel contend that Respondent refused to bargain on the issue of initial staffing of new shifts because Diederich insisted that Respondent have discretion to choose employees, rather than having selections controlled by volunteers or seniority. The proposal on the issue was made by Respondent in the November 18–19 session, and Miller, according to Diederich's testimony which I have credited, agreed in principal on the issue at the next bargaining session, December 10, 1980. The Union's quick agreement makes it impossible to say that Respondent ''insisted'' on the issue. Moreover, Respondent had a right to insist on the selection of I employees by its concepts of merit rather than volunteers or seniority, as the criteria for placing employees on a new shift were necessarily mandatory subjects of bargaining within *NLRB v. Borg-Warner Cor.*, supra.

Finally, on the issue of seniority, Charging Party argues that Respondent refused to bargain on the issue of the rankings of employees hired on the same day. As noted above, Respondent, during its busy season, hired as many as 100 employees a day. The only demand made by the Union was that in even numbered years employees be ranked from A to Z, and Z to A in odd-numbered years. The system proposed by Respondent (ranking according to the time the applicants accepted employment) may not have been the perfect solution, but it was certainly less arbitrary than the system proposed by the Union. Respondent's refusal to agree to that arbitrary system cannot be said to have been in bad faith according to any reasonable standard.

(h) *Recognition*

The Union contends that on the issue of recognition Respondent was guilty of bad-faith bargaining in the following particulars: (l) it refused to recognize Local 1180 as an agent of the Charging Party: (2) it insisted to impasse on the exclusion of senior receiving inspectors, a position specifically included in the certification; and (3) Respondent insisted to impasse upon a statement that the parties had a right to test unit placement determinations made by the Board in the court of appeals. General Counsel urge only the third contention made by the Union, but further argues that Respondent insisted in bad faith on limiting any recognitional clause to Respondent's current Sioux Falls address.

Respondent had no obligation to recognize Local 1180 for anything. Nor was it required to agree it would ''recognize'' the Local as an ''agent'' of Respondent. The employer's refusal to recognize a noncertified local which was created by a certified international union was considered to be evidence of bad faith in the administrative law judge's decision in *Chevron Chemical Co.*, supra. While the issue was not discussed in its decision, the Board apparently disagreed as it dismissed the complaint. That is'' Respondent's refusal to recognize Local 1180 for any purpose[102] cannot be said to have been in bad faith.

Nor do I find evidence of bad faith in Respondent's attempts to eliminate from the unit description the position of senior receiving inspector. The Union does not question the good faith of Respondent's assertions that the position had been, or was going to be, eliminated and therefore it was superfluous. Moreover, Respondent did not state or otherwise indicate at any time that elimination of the senior receiving inspecter was a condition precedent to the signing of an agreement. Accordingly, I reject this union contentions.

I do agree with General Counsel and Charging Party that Respondent's insistence on a statement of review by the court of appeals of unit placement determinations was a violation of Section 8(a)(5). Respondent's final proposal was:

> If the Company decides to create new jobs not presently described in the above-described bargaining unit during the term of the agreement, the Company agrees to notify the Union of its intent and to bargain in good faith with respect to the inclusion or exclusion of such new jobs in the bargaining unit. If no agreement can be reached by the parties, they agree to be bound by a determination of the National Labor Relations Board, or Court of Appeals, as to the inclusion or exclusion of such new jobs.

Miller at all times objected to the inclusion of this language as superfluous or a matter which should be decided by arbitration or, at least, the Board. Diederich rejected arbitration of any such issues and insisted that any contract include the statement of Respondent's rights to appeal unit determination by the Board to a circuit court.

Respondent's avenues of appeal of unit determinations is not a term or condition of employment of the unit employees. While a statement of Respondent's rights under Section 10(f) of the Act may seem innocuous, it still remains in an area outside of ''wages, hours and other terms and conditions of employment,'' under Section 8(d), and is not a mandatory subject of bargaining over which Respondent had a right to insist.[103] Therefore the Union was entitled to stand on its objections to the inclusion of the statement, and Respondent's

[102] It may have been an oversight, but Respondent did recognize Local 1180 for at least one purpose; it agreed periodically to furnish seniority lists to ''the President of the Union,'' and there is no way to conclude that Respondent meant the president of the International.

[103] See *NLRB v. Borg-Warner Corp.*, supra.

insistence that such a clause be a term of any contract constituted a per se violation of the Act.[104]

I reject the contention made by General Counsel, but not Charging Party, that Respondent bargained in bad faith by insisting that any recognitional clause be limited to Respondent's current Sioux Fall'' address. In its January 28, 1981, plenary proposal the Union first demanded recognition for Respondent's entire division, without limitation. This was rejected without much discussion, and on January 28 the Union demanded recognition for all plants Respondent might open within a 40-mile radius. Diederich still objected on the ground that new plants may or may not be an accretion to the existing unit and the employees may well be entitled to an election. Miller accepted this explanation and the issue of the geographic limitations on recognition was not mentioned again until April 30. On that date Miller stated that his only objections to Respondent's final proposal on recognition were to the insistence on the expression of the right of review of unit placement determinations by the Board and the elimination of the senior receiving inspector's position. Therefore, the geographic limitation of the extent of recognition was never an issue which provoked much discussion, and what little there was does not demonstrate bad-faith bargaining by Respondent.

(i) *Hours of work*

General Counsel and Charging Party contend that Respondent's insistence on the unilateral right to change shift hours, and merely notify the Union after the fact, constitutes evidence of bad faith. The Board in *Tomco Communications*, 220 NLRB 636 (1975), enf. denied 567 F.2d 871 (9th Cir. 1978), held that insistence on a unilateral right of ''scheduling'' was violative in that it is a demand that the union abandon its statutory rights. It is to be further noted that the only reason Diederich gave for Respondent's insistence was a sham. Diederich stated that Respondent needed the power to change the starting and ''quitting time'' unilaterally so that adjustments could be made in order to avert traffic jams in the industrial park in which Respondent was situated. Diederich did not testify that traffic jams had been a problem; he testified only that they might become a problem as development occurred in the industrial park. This reliance on the specter of hypothetical traffic jams as a basis for vitiating a statutory right would, under the Board's decision in *Tomco*, be an indication that Respondent had not bargained in good faith on this issue. However, the Board in *Chevron Chemical Corp.*, supra, held that the employer's insistence on a management-rights clause which included a unilateral right to determine all starting and quitting times was no more than ''hard bargaining,'' and I therefore feel constrained to reject the contentions of General Counsel and Charging Party on this issue and follow the later decision of the Board. Accordingly, I do not find Respondent's insistence on the unilateral right to change shift hours to be an indicia of bad faith.

(j) *Union leaves of absence*

The complaint does not allege a refusal to bargain on the issue of leaves of absence and General Counsel did not include this issue when making his final argument at trial or mention it in his brief. The Union insists that Respondent did bargain in bad faith on the issue of leaves of absence for union purposes. Assuming that this contention is included in the general allegations of bad faith in the complaint, I reject it. While Diederich had first flatly refused to bargain on the issue of union leaves of absences, at the session on February 10, 1981, a relatively early date, Diederich did agree to allow one employee to attend the Union's annual convention and one employee to attend district meetings up to three times a year if production needs would permit it. The Union made no further demands on the issue, and this was the agreement reached by the parties. I find no evidence of bad faith on Respondent's part on this issue.

(k) *Bulletin board*

The complaint does not specifically allege that Respondent negotiated in bad faith over the issue of bulletin boards, and General Counsel advances no contention in that regard; however, the Union argues that Respondent's position was ultimately to keep the Union from posting any matter on the one bulletin board which Respondent agreed that the Union could use.

Assuming that his contention is within the general allegations of the complaint that Respondent refused to bargain in good faith, I reject it. While Respondent did insist upon the right to remove certain literature, the categories involved were specified by Respondent and none of these were so vague or ambiguous as to prevent the Union from posting any legitimate union messages on the bulletin board. Accordingly, I find that there is no evidence that Respondent bargained in bad faith on the issue of bulletin boards.

(l) *Duration*

The complaint does not allege that Respondent bargained in bad faith on the issue of duration and General Counsel did not argue that Respondent's conduct in regard to this issue was an indicia of bad faith. However, the Union argues that Respondent acted in bad faith because during most of the bargaining it insisted upon a contract of less than a year. While it is true that for a great portion of the time Respondent did insist on a contract of extremely short duration, Respondent's final offer was for a year. I do not believe that Respondent's conduct in regard to the issue of duration constitutes evidence of bad faith and I reject this contention by the Charging Party.

(m) *The ''takeaways''*

General Counsel and the Union appear to argue, without expressly saying so, that any proposal which provides employees with less than they had before organization is a per se violation. This is not the law of course. Proposals to reduce benefits, or ''takeaways,'' can be evidence that Respondent is not seriously attempting to reach accommodation with a union. *Herman Sausage Co.*, supra. Each proposal, and Respondent's reasons therefor, must be viewed together to ascertain Respondent's motive. But, absent evidence of motive to the contrary, proposals to reduced economic benefits, or impose more stringent terms and conditions of employment will not, by themselves, be held to be evidence of bad faith, even where Respondent is found to be in bad faith in other areas. For example, in *Struthers Wells Corp.*, 262 NLRB 1080 (1982), the Board found respondent had en-

[104] Id.

gaged in an overall pattern of bad-faith bargaining. Evidence of bad faith was specifically found in the employer's refusal to bargain on wages, but only because respondent insisted on an unilateral right to determine wages during the period of the contract and withheld a promised wage increase. The Board did not find bad faith in the employer's insistence on eliminating it; established practice of semiannual wage increases. It stated, in footnote 10 of the administrative law judge's decision adopted by the Board:

> This is not to say that Respondent's proposal to reduce the number of wage increases during the contract terms was evidence of bad faith. There is no evidence that Respondent was motivated by anything other than economic considerations in its proposal to reduce the merit wage reviews from a semi-annual to an annual basis. Respondent was seeking an economic concession only, and this is the essence of bargaining.

That is to say, the Board views ''takeaways'' which reduce the authority of the Union (for example the Union's right to bargain on wage increases or other issues) in a more critical light than those which are motivated purely by economic considerations or considerations of efficiency.

This being the case, the first ''takeaway'' to address is Respondent's proposal to eliminate future February wage increases. As in *Struthers Wells*, this was a purely economic proposition, but it was also supported in bargaining by Diederich's argument that the practice of giving wage increases to some, but not all, employees at different times of the year caused disruption and discontent with which Respondent did not wish to deal. That is, Respondent wished to eliminate the practice for the future for real economic, and noneconomic, reasons which were given the Union, and it cannot be said that Respondent's position was taken in bad faith.[105]

Other ''takeaways'' were purely economic in nature, or were directly related to the terms and conditions of employment of the unit employees. On these issues Diederich fully explained Respondent's reasons. On many of them Diederich offered compromise upon consideration of the protestations by the Union. These issues include the restriction on holiday pay for probationary employees; changing the system of payment for night-shift premium from a percentage to cents-per-hour basis; insistence on elimination of the prior sick leave policy,[106] elimination of a 40-hour vacation bonus for subsequently hired employees upon their reaching the 5-year anniversary date, and elimination of the practice of paying for employee-only medical and dental premiums. I find no evidence of bad faith in Respondent's positions on these issues.

What cannot be fairly characterized as a ''takeaway'' was Respondent's insistence on the right to require employees to take 1 week's vacation during the summer shutdown. This policy was established, in writing, on May 22, 1980, by Virag's memorandum to all employees. In all sessions where the matter was brought up Diederich gave Respondent's reasons for its refusal to change the policy, and Charging Party does not question the legitimacy of any of these reasons. Accordingly, I reject the contention made by the Charging Party (but not by General Counsel) that Respondent bargained in bad faith on the issue of compulsory vacations during summer shutdowns.

(n) *Supply-and-demand wage bargaining*

Of course, at the epicenter of the disputes on economic proposals was the topic of wages. Throughout bargaining, Diederich explained to the Union that Respondent was willing to pay no more than required to secure the employees it needed. At least 90 percent of the employees in the unit are assemblers; the only skill required of assemblers is manual dexterity. Respondent found itself able to secure all the assemblers it needed by paying most of them the minimum wage or slightly more. This being the circumstance in which the employees found themselves, the economics of the situation was not on their side. The Union had no answer for Diederich's supply-and-demand theory of labor economics and was never able to convince Respondent that it should pay on any other basis. The Union was unwilling to strike in order to test Respondent's representation that it could get all the employees it needed by paying the wages it did. While the Union is not required to go on strike, it does not possess the ready alternative of utilizing the National Labor Relations Board to compel Respondent to offer higher wages. This is not the function of the Board; Respondent's taking advantage of the economics of the situation cannot be held to be evidence of bad faith; and I reject the contentions of General Counsel and Charging Party to the contrary.

(o) *Delayed benefits coverage*

On May 13, 1981 (the 40th session), the parties reviewed Respondent's proposal of April 9.[107] Miller pointed out that Respondent was proposing a $250,000 limit on major medical coverage, whereas the benefit had previously been unlimited. Diederich said he would check it out. At the next session, May 14, he acknowledged that Miller was right and changed the proposal to unlimited lifetime coverage. At the hearing General Counsel called this action of Diederich tactic of ''regression.'' Diederich credibly called it an oversight, and since he corrected his proposal at the next session after it was called to his attention,[108] it cannot be said that it was a ''tactic'' of any sort. Accordingly, I reject this contention of General Counsel and recommend dismissal of the specific allegation of the complaint upon which it is based (par. 13(b) of the complaint in Case 18–CA–74021.

(p) *Voluntary layoffs*

The complaint alleges that Respondent refused to bargain on the issue of layoffs. While it is clear that Respondent had

[105] While the rationale of *Struthers Wells* would protect Respondent's insistence on annual increases only in the future, it did not protect Respondent's withholding of the February 1981 wage increase, as discussed infra. This is because Respondent's reasons for withholding that single increase were totally disingenuous.

[106] However, as I stated previously, Respondent's insistence on the absence control program which was substituted for the sick day program was evidence of bad faith as the system was unworkable, was kept within the sole discretion of the management, and was impervious to correction under the grievance procedure.

[107] The tr. p. 11,137, L. 15, is corrected to change G.C. Exh. ''64-B'' to ''64-V.

[108] The limited proposal was in Respondent's January 9 proposal, but Miller apparently did not notice it until it was reproposed on April 9. That is Miller made no objection until May 13, some 28 bargaining sessions after it was originally proposed.

allowed employees to volunteer for some layoffs in the past, it was not established that it permitted volunteers in all cases of layoff. But assuming this was a past practice, the only argument Miller made for keeping it was that some employees wanted to keep it. Diederich and/or Virag repeated many times Respondent's reasons for wishing to disestablish the practice (conflicts between employees, employees changing their minds, conflicts with the South Dakota Unemployment Commission), and the Union never disputed any of these reasons. Again, all past practices were not vested rights of the employees, and Respondent had a right to bargain for a cessation of the practice, to the extent it existed. Accordingly, I shall recommend that the allegation that Respondent refused to bargain on the issue of voluntary layoffs be dismissed.

(q) *Equal distribution of overtime*

This was not a practice which the Union sought to preserve; it wished to establish a system of equal distribution of overtime. Diederich and/or Virag and/or Ori repeatedly gave Respondent's reasons for not agreeing (recordkeeping, burden on supervisors, grievance-generator, and a desire to continue a practice of keeping entire lines of production on overtime) and the Union never disputed the validity any of them. This was not bargaining in bad faith; it was a simple refusal to agree for legitimate reasons.

Accordingly, I shall recommend dismissal of this allegation of the complaint.

(r) *Limitations of reinstatement rights*

Respondent proposed to limit to 12 months the recall rights of economic strikers. This proposal was not mentioned in Miller's testimony. Diederich had no specific recollection of any discussion of the proposal, although when summarizing disagreements at the end of his testimony he ventured that the Union had objected to it at some point. This is not enough evidence to find that Respondent insisted on agreement on this issue. Assuming that it did, a similar proposal was approved by the Board as a strike settlement agreement in *United Aircraft Corp.*, 192 NLRB 382 (1971), and the matter is necessarily a mandatory subject upon which the Respondent could lawfully insist.

Accordingly, I shall recommend that this allegation of the complaint be dismissed.

(s) *Overall bad faith*

I have found that Respondent has refused to bargain with the Union by insisting on a ''zipper'' clause which required the Union to waive all rights under all statutes which may exist for the benefit of the employees or itself, by refusing to consider the Union's demand for checkoff, by insisting upon the nonmandatory subject of bargaining that any contract express its right of review of Board unit placement decisions, and by insisting upon the unusually harsh provisions contained in its ''no fault'' absence control policy.

As discussed above, the only reasons given the Union for Respondent's refusal to agree to the Union's checkoff proposal collectively constituted a sham. Respondent gave no reason for its insistence on a zipper clause which would require the waiver of all rights under all statutes, or for its insistence on a contractual expression of its right of review of Board unit placement determinations. While it gave reasons for some absence control program, it insisted upon its unusually harsh ''no fault'' program with the supreme confidence that the proposal could not be accepted by this Union or any other union which purports to represent employees to their benefit rather than their detriment.

Respondent's reliance on sham or nonexistence ''reasons'' for its positions and its insistence upon a term of the contract which was as harsh as its absence control program demonstrate that Respondent was seeking to frustrate agreement rather than reach one.[109] This is true, even though I have found no palpable evidence of bad faith in Respondent's bargaining on most issues in dispute between the parties. The number of issues upon which Respondent bargained in bad faith is not the question; a bad-faith position on one issue can frustrate bargaining on all other terms in the host of items which may be covered by a comprehensive collective-bargaining agreement.[110]

Therefore, I am in agreement with General Counsel and Charging Party that, despite its extensive bargaining on many topics which bears no independent reflection of bad faith, Respondent has engaged in an overall pattern of conduct designed to frustrate the bargaining process. While it is impossible to determine with certainty just when Respondent adopted this pattern of conduct, it was at least by November 18, 1980, when it not only rejected the Union's proposal for checkoff, it did so with a closed-minded hostility revealed by the counterproposed punishment of any employee who attempted to collect dues in other ways.

Accordingly, I find and conclude that at all times since November 18, 1981, Respondent has failed and refused to bargain in good faith with the Union on the topics of checkoff, zipper clause, and absence control program, and has insisted on a nonmandatory subject of bargaining, and has further engaged in an overall pattern of bad-faith bargaining all in violation of Section 8(a)(5) and (1) of the Act.[111]

(2) Union conduct

(a) *Discussion*

As noted earlier, under Sections 8(b)(3) and 8(d) of the Act, labor organizations have the same duty to bargain in good faith that as do employers under Sections 8(a)(5) and 8(d).

I agree with Respondent that the Union's insistence on recognition of Local 1180 was evidence of bad faith. In *Latrobe Steel Co.*, 244 NLRB 528 (1979), the Board found the employer in violation of Section 8(a)(5) by insisting to impasse on including an uncertified local as co-representative of the employees whom the international body was certified to represent exclusively. On cross-examination Miller acknowledged that as late as July 30, 1981 (session 47) he was still seeking language ''so that there would be recognition of the Local. There is no meaningful distinction between the

[109] *NLRB v. Reed & Prince Mfg. Co.*, supra; *Pease Co. v. NLRB*, supra.

[110] For example, in *NLRB v. H. K. Porter*, supra the only issue upon which the employer was alleged to have refused to bargain, by the time the case got to the Supreme Court, was checkoff.

[111] Further evidence of Respondent's overall bad faith is found in its falsely stated basis for refusing to grant wage increases in February 1981, as discussed infra where that issue is treated with other alleged unilateral actions.

conduct of the Employer in *Latrobe* and the Union herein on the issue of recognition.

I further agree with Respondent that Miller refused to bargain on the subject of work rules. Miller adamantly refused to bargain about any rules for the first 34 sessions. Thereafter, when Diederich threatened to file 8(b)(3) charges, Miller began going through the motions of bargaining about rules, but he actually did not do so as he quibbled with almost every proposed rule. While some of Respondent's proposed rules were of dubious necessity, many were not; however, they were all challenged by Miller for the better part of the remaining sessions. Clearly Miller was attempting to avoid reaching agreement on work rules. Ultimately, the parties were apart on only two rules when Miller left negotiations; however, it must be concluded that his conduct on the issue of work rules substantially impaired the bargaining process.

Miller agreed that Respondent did not have to show cause for the discharge of probationary employees. Laskowitz, without reason, repudiated this agreement,[112] and this action was an act of bad-faith bargaining.[113] However, I do not believe that this act, coming as it did in the 49th session, had any effect on the bargaining process. Certainly, Respondent premised none of its positions on Laskowitz' conduct.

A minimal amount of time was spent on the issue of union security (as opposed to checkoff) during bargaining. This was because Respondent had a completely closed mind on the issue of checkoff. The greater includes the lesser; Miller obviously knew that if he could not get Respondent to entertain the proposal for checkoff, there was no point in wasting time by insisting on union security. Therefore, assuming that a ''proposal'' is made out by Miller's statements that the Union would like to have a union security agreement ''similar'' to that in the *existing* labor agreement at the Sioux Falls plant of the John Morrell Company, and further assuming (as Respondent argues) that this *existing* language is facially invalid under South Dakota law (which I do not), I would not find that Miller's conduct on this point impeded bargaining to any extent.

I further reject Respondent's contention that the Union bargained in bad faith by demanding that the ''floater'' holiday be designated by vote of the union membership, rather than by vote of all employees in the union. The issue was mentioned first at session 8 when Diederich asked Miller how, under the Union's generalized proposal, the floater holiday would be designated; Miller responded ''by vote of the membership, and Diederich did not reply. At session 16, when the parties were reviewing the Union's plenary proposal, Diederich asked the same question and got the same answer. Miller added that selection by membership was the way it was done in Minneapolis; Diederich replied that there was a union-shop agreement in Minneapolis; Minnesota is not a ''right-to-work'' State which South Dakota is; therefore, it would not be fair since all unit employees would not necessarily be members of the Union as was the case in Minneapolis. At that point the matter was dropped by the Union, albeit not expressly. The designation-by-membership ''proposal'' (which never was written), was never raised again by either side although the subject of holidays was raised and discussed many times in subsequent bargaining sessions. In summary, Miller had (again) equated the Minneapolis plant with the Sioux Falls plant. When Diederich pointed out the legal distinction, the matter was not mentioned again. The verbal responses of Miller at bargaining sessions 8 and 16, based as they were on obvious legal ignorance, hardly rise to the level of a ''proposal'' on a prohibited subject of bargaining, as Respondent argues. Accordingly, I do not find that the Union bargained in bad faith on this issue.

I further do not find that the Union bargained in bad faith by proposing superseniority for union officers who do not handle grievance as well as those who do. While it is clear that the Board will find invalid the granting of superseniority to employees who do not handle grievances, the decisions of the Board and courts on this issue are not made on the basis of titles, but on the basis of functions. An officer may well handle grievances. While the Union did not specify in its proposals that officers would handle grievances, it certainty could have worked out that way. Also, if Diederich had corrected Miller on this aspect of the law, as he did on the holiday-selection-by-members-only ''proposal,'' the proposal for superseniority (or ''layoff deferment'' as Miller called it) may well have been withdrawn. But the discussions never got that far because Respondent was not agreeing to any superseniority. That being the case, just whom the Union wished to be granted superseniority was moot.

Finally, there is no legal basis for Respondent's argument that ''the Union bargained in bad faith by misrepresenting the Respondent's bargaining proposals in leaflets distributed to employees,'' and the matter need not be discussed further.

(b) *Conclusions*

At page 66 of its brief, Respondent states:

> An employer's conduct in collective bargaining cannot be held to violate the Act if the union's conduct is such that it failed to satisfy its obligation as the duly certified representative to bargain in good faith. *Continental Nut Company*, 195 NLRB 841, 858 (1972); *Time Publishing Company*, 72 NLRB 676 (1947); *General Drivers & Helpers Union, Local 554 v. NLRB*, 522 F.2d 562, 566–67 (8th Cir. 1975).

None of the cases cited stand for the broad proposition argued by Respondent. In none of the cited cases was the employer found to have bargained in bad faith on any issue. This was not because the unions involved in those cases were found to have bargained in bad faith, as Respondent seemingly argues, but because the conduct of the employers in each case conduct comported with the requirements of Section 8(d) of the Act.

There is no authority for the proposition that even though an employer has bargained in bad faith, a bargaining order can be withheld because the union involved may not have bargained in good faith on all issues. Therefore, while I have found that the Union failed to bargain in good faith on the issues of recognition and work rules, and that at a late session Laskowitz unlawfully repudiated one of Miller's agreements on probationary employees, this still does not detract

[112] I do not agree with Respondent that there is sufficient evidence to show that Laskowitz repudiated Miller's agreement that probationary employees would not accumulate seniority or that Laskowitz repudiated Miller's agreement regarding 1088 of seniority of laid-off employees who give Respondent written notice that they have accepted full-time work elsewhere.

[113] *San Antonio Machine & Supply Corp.*, 147 NLRB 113 (1964).

from the fact that at the same time Respondent was engaged in a program of bad-faith bargaining, and a bargaining order is necessary to remedy such conduct.

2. Alleged unilateral actions

The complaint alleges that after certification of the Union, Respondent engaged in several actions without bargaining with the Union in violation of Section 8(a)(5) of the Act. Respondent defends each allegation either on the basis that there was no ''change'' involved, so that bargaining was not necessary, or that it did bargain to impasse before any change was made.

It is the law that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing employees' terms and conditions of employment because such action is a ''circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) as much as does a flat refusal. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

It is true, as argued by Respondent, that if an employer negotiates to impasse with a Union and no agreement is reached, it is free to implement its last proposal. *Taft Broadcasting Co.*, 163 NLRB 475 (1967). However, it is also true that ''there can be no legally cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action, if a cause of the deadlock is the failure of one of the parties to bargain in good faith.'' *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963).

In this case, Respondent is alleged to have committed a multiplicity of unilateral actions which I shall address in chronological order. As I have found and concluded above, Respondent embarked on its unlawful course of bargaining at least by November 18, 1980. Therefore, for all alleged unilateral actions occurring after that date, the theory of *Taft Broadcasting* does not apply, and the defense of ''impasse'' is not available to Respondent.

a. *Telephone use*

The complaint alleges that at some time after September 11, 1980, Respondent unilaterally changed its past practice of permitting employees to use plant floor telephones for personal use.

In addition to telephones placed throughout the production area, there are telephones in the cafeteria at which employees may make personal calls at no charge. It is undisputed that before the petition for election was filed in this case, Respondent maintained in its employee handbook a rule prohibiting employee use of plant-floor telephones for personal calls. One employee, Carrie Dickens, testified that despite this rule the practice in the plant had been that employees could use the plant floor telephones, in addition to the cafeteria telephones, on breaks without supervisory permission. Dickens further testified that a few weeks after the September 12 election she was told by her supervisor, Dennis Kiepke, that the employees could no longer make outside calls from the plant telephones, on breaks or otherwise, unless it was an emergency, and then only with supervisory permission.

General Counsel and Charging Party rely on Dickens' testimony as establishing a past practice that employees could use the plant telephones, at least during breaks, without supervisory permission.

Kiepke credibly denied that employees in the electronics section (where Dickens worked) were permitted free use of the plant telephones during breaks; therefore, I find no ''change'' occurred and I shall recommend that this allegation of the complaint be dismissed.

b. *Makeup time*

The complaint alleges that at some time after September 11, Respondent unilaterally discontinued its practice of allowing auditors (inspectors) to make up lost time when they had been absent. Employee Sylvia Dunkleburger testified that a month after the election, at a time when he was supervisor of the auditors, Roger Kozel announced to a meeting of 13 or 14 auditors that they would no longer be allowed to make up lost time.

It is undisputed that Kozel stopped being supervisor of the auditors on August 8, over a month before the election. Additionally, Dunkleburger was clearly guessing as to the number of times she had been permitted to make up lost time, and no other auditors were called to testify about the meeting or Respondent's practices regarding make up time for auditors. Kozel and Earl Erpleding (who succeeded Kozel as supervisor of the auditors) credibly denied they told the auditors that they no longer would be allowed to make up lost time, and there is no credible evidence that the practice was, in fact, changed.

Accordingly, I shall recommend that this allegation of the complaint be dismissed.

c. *Voluntary layoffs*

The complaint alleges that at sometime after September 19, 1980, Respondent unilaterally abolished a practice of permitting employees to volunteer for layoff. The action upon which this allegation is based is the undisputed fact that Respondent laid off a group of probationary employees on December 23, 1980, without affording other employees an opportunity to volunteer first.

Employee Sylvia Dunkleburger and Mark Hubert testified that in 1978 and 1980, respectively, employees in their departments were permitted to volunteer for layoffs. General Counsel and Charging Party rely on this testimony and a campaign statement by Virag for the proposition that Respondent did, in fact, have a past practice of permitting employees to volunteer for layoffs. The statement by Virag is contained in a memorandum, dated April 2, 1980, to all employees which states, inter alia:

> In my opinion the Litton Sioux Falls plant does not *want* or *need* a union to tell us to lay off by strict seniority. If that were done, all employees with hire dates of 12-5-79 or after would be on lay off today.
>
> I believe that at least 170 (85 that went)—(85 that didn't) employees appreciate that fact the company recognizes not everyone can take a lay-off.
>
> Making it voluntary allows those that can, to take it, and allows others to stay that probably couldn't take it without causing a hardship.

Virag acknowledged that Respondent had, in 1978 and February 1980, permitted layoffs by volunteers. According to Virag the voluntary layoff system was workable in 1978, when the plant was less than a year old and small; but the

results in 1980, when the employee complement was over 600, were quite different. It did not work for the reasons given the Union during the bargaining session, as detailed infra.[114] Additionally, Virag testified, Respondent ''laid off probationary employees first, in many cases, if we would accommodate a layoff by laying off probationary employees first.''

This testimony was undisputed. Therefore, the past practice, if any, was mixed: sometimes by probationary employees first and only twice by volunteers first. Therefore, it cannot be said that by Respondent's two layoffs by volunteers in the first 3 years the plant had been open established an unwavering practice of layoffs by volunteers first, no matter what Virag had told the employees during the campaign. Moreover, according to undisputed testimony by Virag the layoff of December 1980 consisted exclusively of probationary employees; therefore, it was conducted within established practices at the plant, and there was no duty to bargain over the matter.

Accordingly, I shall recommend that this allegation of the complaint be dismissed.

d. *Medical insurance premiums*

Prior to the negotiations herein, Respondent had paid 76 percent of all increases in group health insurance premiums for family coverage. (It paid all the cost of employee-only coverage.) On July 30, 1980, Respondent was notified by Litton Industries, the self-insurer of the Division's group policy, that increases were to go into effect on August 1, 1980. The effective date of the increases was therefore just 43 days before the election. Rather than pass along the usual portion of the increases at that time, Respondent absorbed all the increase, $9 per employee, for the months of August, September, and October.

On October 7 (session l) Diederich told Miller that ''we had had an increase in the insurance premium'' and that Respondent was proposing to pass the increase along in the same ratio that had been utilized in the past. At that session and throughout negotiations, the Union proposed only that Respondent assume all increases and pay all cost of family coverage (as well as employee-only coverage.) Diederich's response was that the matter was negotiable, but, absent agreement Respondent would put the increases into effect the first pay period in November.

When asked by Miller why Respondent had not put the increase into effect when it was received by the Company, Diederich replied that he had not wished to do it unilaterally. Of course, this reply was false. Before the election Respondent had a perfect right to continue in its established practice of passing along the increases in the same (76/24) ratio as Diederich, a labor lawyer of 20 years' experience, necessarily well knew.

By memorandum dated November 10, Respondent announced the premium increase in family to employees, effective November 3.

Charging Party argues that, while Respondent had passed along the increases in family health coverage in the past, the absorbing of the increase for the months of August, September, and October 1980, established a practice which Respondent could not change without bargaining to impasse with the Union.[115]

It is more than clear to me that the only reason Respondent did not pass along the August 1 increase in family health premiums was the September 12 election. As a tactical matter, Respondent absorbed the increase in order not to add one more arrow to the Union's campaign quiver. However, there is no evidence that Respondent intended to absorb the increase for a day after the election if it had won. It certainly did not tell the employees it was absorbing the increase, as I have noted in my discussion of the 8(a)(1) allegations above.

While Respondent had a right to pass along the increased premium before the election, it had no legal duty to do so. In the 7 bargaining sessions between the election and the November 10 announcement of the increase, Respondent bargained in good faith on the issue by insisting on doing no more than what had been done with the prior increases.

In summary, I would not find that Respondent's election tactic of absorbing the increase; for August, September, and October 1980 constituted the establishment of a practice over which Respondent was required to bargain before changing. But, assuming that to be the case, Respondent bargained to impasse over the issue.[116] Accordingly, I shall recommend dismissal of this allegation of the complaint.

e. *Smocks*

The complaint alleges that, as an unlawful unilateral action, Respondent in November 1980, discontinued its practice of providing protective smocks to employees in the lamination area.

Respondent did discontinue providing cloth smocks. This was because it was notified by the linen service for the smocks that the adhesives used in the lamination area could no longer be laundried out because the process was discovered by the State of South Dakota to create an unlawful water pollutant. Thereupon, Respondent switched to plastic aprons.[117]

While Respondent did not consult with the Union regarding the change from cloth smocks to plastic aprons, the Board has repeatedly stated that the principles restricting unilateral action are not meant to be inflexible rules to be mechanically applied irrespective to the circumstances of the case. Minor changes, such as the type of aprons that are used, have no substantial effect on the employees and are clearly normal management functions which do not require prior notice to and bargaining with the Union. *Irvington Motors*, 147 NLRB 565, 566 (1964); *Little Rock Downtowner*, 148 NLRB 717 (1964).

Accordingly, I shall recommend that this allegation of the complaint be dismissed.

[114] Employees changed their minds; the wrong employees volunteered; when the layoff went longer than expected, employees came back and attempted to bump other employees; the South Dakota unemployment commission was faced with claims from employees who ''volunteered'' to be unemployed and complained to Respondent, etc.

[115] Charging Party also argues that Diederich's dissembling is additional evidence of bad-faith bargaining. I disagree. While the giving of a false reason for a proposal is evidence of bad faith, as noted above, Diederich's falsehood was not advanced as a basis for his proposal but as a reason why Respondent did not pass along the premium increase when it occurred.

[116] ''Good faith impasse,'' to be redundant, was still possible at this point because, as I have found above, there is no evidence of Respondent's bad faith until it submitted its November 18 proposals.

[117] One employee, Mark Hubert, testified that Respondent discontinued providing smocks altogether. This was not true.

f. *Breaks*

(l) Facts

Prior to the advent of the Union, the employees received two paid break periods of 10 minutes each and an unpaid lunch period of 30 minutes per day. Breaktime could be spent in the cafeteria or in the work areas, but eating, drinking, or smoking were prohibited in the work areas. How the 10- and 30-minute periods were counted is an issue in this case.

The complaint alleges that on or about December 8, 1980, Respondent unilaterally reduced the amount of time allocated to work breaks by requiring employees to remain at their workplaces until breaktime began and to be at their workplaces at the time work breaks ended. General Counsel contends that before this date employees were allowed ''travel time'' to and from their work stations so that breaks (and lunch) periods began and ended when employees arrived at and departed from work stations. Respondent replies that the alleged unilateral action represented no real change and denies that it had an obligation to bargain over its action.

On December 5, John McCartin issued a memorandum to all employees announcing:

> Effective Monday, December 8, 1980 a new plant timing system will be put into effect. Everyone has probably heard the signals for the past few days. The purpose is to assist everyone in starting, breaking, lunches, and stopping of work. There are two tones (signals) involved:
>
> 1. A steady tone which signals an event ie: break time, lunch time, quitting time, etc. and
> 2. Four short tones two minutes before an event to inform everyone the event is about to happen.
>
> Below is a list of the warning tones and event tones by time. You will be able to apply the appropriate break/lunch times to your personal function/line/area/
>
> [Then followed a listing of ''Shift Start,'' ''Morning Break,'' ''Lunch Break,'' ''Afternoon Break'' and ''Shift Stop,'' with a corresponding ''warning'' time and ''event'' time.] The event time is the actual time for implementation ie:
>
> 1. Start Time (At Work Station)
> 2. Start Break (Leave Work Station)
> 3. End Break (Be Back at Work Station)
> 4. Start Lunch (Leave Work Station)
> 5. End Lunch (Be Back at Work Station)
> 6. Shift Stop (Leave Work station)
>
> [It] is very important that people observe these times as line starts/stops and personnel lateness will be established by these signals.''

Before issuance of this memorandum there had been no discussion at the bargaining sessions of how breaks had been, or were to be, regulated.[118]

Employee Carrie Dickens testified that after McCartin's memorandum, employees complained to electronics department supervisor Abraham that the new ''buzzer system'' shortened their breaks because they were no longer allowed travel time. Abraham, according to Dickens, replied that breaks had become too long and that he had measured the walking time from the electronics area to the cafeteria and found that by walking briskly, the trip could be made in 2 minutes and 35 seconds. Abraham admitted that employees complained to him that the buzzer system had cut into their breaks and he did not deny telling Dickens, and other employees in the area, that breaks had become too long. He further stated that his timing of the walk to the cafeteria (at a ''moderate'' pace) was 1 minute and 35 seconds. Dickens testified that after the buzzer system was put into effect, she began taking her breaks in the work area, rather than the cafeteria, because ''[I]t is too far. It cuts into our break time.'' Abraham testified that his observation was that the same number of employees took breaks in the work area after McCartin's memorandum as before. He further testified that after the memorandum was issued, if employees were ''more than a minute late, I might mention to them that it was time to start a little earlier from upstairs,'' and this was no change from his practice before the buzzers were instituted.

Sandra Haider, also an employee in the electronics department, testified that before the institution of the buzzers, employees would leave their workplaces at the time breaks were scheduled, walk to the cafeteria which took ''roughly two minutes on the average''), and then, ''most of the time I think we looked at our watches when we got there and spent 10 minutes, then we would leave.'' Haider testified that after institution of the buzzers, she continued to take breaks in the cafeteria, but, as directed by McCartin's memorandum, she did not leave her work station until the buzzer sounded for breaks and she got up and left the cafeteria at the warning buzzer which sounded 2 minutes before the end of the breaks periods. Therefore, according to ''aider's testimony, assuming a walk of ''roughly two minutes,'' the time in the cafeteria for Haider was reduced from 10-minute to 6-minute break periods, and 30-minute to 26-minute lunch periods.

McCartin had been hired on September 8, 1980, as manager of manufacturing operations. He testified that he noticed that the clocks throughout the plant were not synchronized and that groups of employees were leaving for and returning from breaks at different times. This caused interference with production among the lines which were supposed to be coordinated. Therefore, he ordered the installation of a central clock and the system of buzzers to announce starting, quitting, and break periods.

In addition to Abraham, Respondent produced other supervisors to support its contention that McCartin's memorandum and the institution of the buzzer system changed nothing. Jackie Moeller testified that before and after December 8, 5 or 10 percent of the employees would return from breaks late. If they were chronically late about a minute or more, or if they were ever as much as 2 minutes late, ''then I talk to them.''

Green-Line Supervisor Lynette Anderson testified that both before and after the buzzers were instituted, when employees would return from breaks late, ''[T] hey're just told not to, or to watch the break times and that they're using too much time.''

[118] In its proposal of October 7 the Union demanded two 15-minute paid breaks in its counterproposal of November 18, Respondent offered two 10-minute breaks. There was no discussion of how much, if any, the Union's demands constituted an increase in, or whether Respondent's proposal constituted a reduction of, established practices.

Delbert Sellnow, manufacturing superintendent, testified that both before and after McCartin's memorandum ''1 or 2 percent'' of employees would be late; and he permitted some ''leeway''; if it was over 2 minutes, he or the employees' supervisors would verbally warn employees, but no written notices were ever issued.

Each time Miller protested at bargaining sessions that McCartin's memorandum and the institution of the buzzer system constituted a unilateral reduction of break and lunch periods, he was told by Diederich and/or Virag that breaks had an outside limit of 10 minutes and lunch had a limit of 30 minutes, and any supervisor who had permitted more time had been acting contrary to company rules and policies.

(2) Conclusions

Respondent argues that McCartin's memorandum of December 5, 1980, and the institution of the buzzers changed nothing; there was a small number of rule-abusers before the buzzers; they were verbally counseled; there is still a small number of rule-abusers; and they also are verbally counseled; no worse punishment has been meted out. Therefore, according to Respondent, McCartin's memorandum and the institution of the buzzers were essentially meaningless.

Written directives of third-level supervisors such as McCartin could be meaningless only if Respondent were positively disinterested in discipline. Its multiple-page proposals on discipline and discharge and ''rules of conduct''[119] demonstrate that Respondent is anything but disinterested in discipline, and I find simply incredible the testimony of Supervisors Abraham, Anderson, and Sellnow that nothing changed after issuance of the December 5 memorandum and institution of the buzzers.

It is clear from Respondent's testimony that before December 5 some employees were permitted to be away from their work stations at breaks and lunch periods for more than 10 and 30 minutes, respectively. Just how many employees were permitted this license, just how much ''leeway'' they were permitted, and why, is not amenable to precise proof. Perhaps some were individuals were treated with more leniency because of the cafeteria's distance from their work station at this large[120] factory, perhaps there were personal favorites among the supervisors; or perhaps some supervisors were too indolent to do anything about it. But the fact remains that some of the employees, if not all, had more than 10-minute break periods and a 30-minute lunch period before McCartin's memorandum.

After the memorandum, this term or condition of employment of the employees had necessarily changed. Breaks were shortened by whatever period of grace the employees had previously enjoyed.[121] While, at time of trial, no employee had received more discipline than a verbal reminder to be working when the buzzer sounded, it would be naive to deny that the memorandum's reference to ''lateness'' implied the potential of greater discipline. No responsible employee would dare to risk being the first to such discipline. That is, employees would necessarily conclude that ''leeway,'' as Sellnow called it, could no longer be granted by a first-level supervisor because a third-level supervisor had made clear that it could not be granted.

In summary, I find that Respondent's action of December 5, 1980, had the effect of reducing the period of break and lunch time theretofore granted to employees. Since, as it admits, Respondent took this action without prior notice to or bargaining with the Union, I conclude that by this conduct Respondent violated Section 8(a)(5) and (1) of the Act.

g. *Paid Christmas lunch period*

The complaint alleges that on December 23, 1981, Respondent unilaterally ''discontinued its past practice and policy of permitting employees an additional one-half hour Christmas lunch with pay.''

Employee Chuck Eisenhauer testified that before Thanksgiving holidays in 1977 and 1978, and on the last working day before Christmas, 1979, employees received a full hour's lunch period, with one-half of those periods paid by Respondent. Also in those years a catered lunch was served at a cost of $1 to the employees. In 1980, the employees were granted a extra half-hour paid lunch period on the last work day before Christmas Eve,[122] but no food was catered in. This testimony was not disputed by any of Respondent's witnesses, and I find it portrays accurately the past practice of Respondent.

Employee Mark Hubert testified that on Monday, December 21, 1981,[123] he was approached by several employees who told him that they had heard there would be no Christmas lunch that year. Hubert further testified that, ''[s]hortly after that, it was confirmed by my supervisor, Jackie Moeller, that we were only getting one-half hour for lunch, so I went upstairs at my break time, at dinner [to call Virag].'' Moeller did not testify on this point, and I credit Hubert's testimony.

Hubert testified that he did, in fact, call Virag on that date.[124] In the conversation Hubert asked virag if the employees were going to get the Christmas lunch that year. Virag replied that he had not given the matter consideration and that he would check into it and let Hubert know.

On the same day Hubert was hand-delivered a letter from Virag stating:

> Concerning your demand that there be a lunch period of one hour on Wednesday, December 23, 1981, it is the Company's proposal that we stay with the normal one-half hour lunch period.

The letter concluded with an offer to meet with Hubert at the end of the work day to discuss ''your demand and our proposal.''

At the end of the workday, Hubert and employees John Hassara and Carrie Dickens met with Virag in his office.[125]

[119] Respondent's final proposal on ''Class B'' rules includes:

> 5. Failure to be at work at the starting time, leaving the work station or area before quitting time, or breaking for lunch or break periods before the appropriate time, or returning to work late from lunch or break periods.

[120] Virag testified that the plant has 256,000 square feet (or ''about six acres'') of floor space, about half of which is manufacturing area.

[121] For the electronics department this would have been l-minute and 35 seconds off each end of each break according to the walking calculation made by Abraham.

[122] Christmas Eve is a holiday at the plant.

[123] At this time, Hubert was chief steward and sergeant-at-arms of the Local.

[124] Virag admits a telephone call from Hubert, but places it a week or week-and-a-half before the last workday, December 23. I credit Hubert.

[125] Hubert denies that he met with Virag on December 21, 1981, and places his next conversation on the matter with Virag on December 22, and that by telephone. Hubert testified that he could not remember why he had not met

Virag testified that Hubert stated that he expected the employer to continue as the Company had done in the past and grant the Christmas lunch. Virag did not dispute that it had been done before, but, as he testified:

> I told Mark that I thought it was—given the economic conditions, the fact that we had a lot of people on layoff, that the Company was getting into a very difficult competitive situation within the marketplace and that I didn't think it was an appropriate time to be allowing people to take an extra half hour with pay given those conditions. . . . Unless you can give me some economic justification for doing it . . . under the circumstances I think the appropriate thing to do is to stay with the normal half-hour.

Virag further testified that he also told Hubert that he had not made up his mind on the matter and would contact him the next day. On December 22, further according to Virag, he called Hubert to his office and told him that he had reviewed their discussions and had decided that Respondent was not going to grant the Christmas lunch that year.

Respondent does not deny that it had an obligation to bargain with the Union over the elimination of the Christmas lunch. It contends that it met with the Union and did bargain in good faith to impasse on the before the decision was made.

As I have found above, before the discussion with Virag, Supervisor Jackie Moeller told Hubert that the Christmas lunch was not going to happen that year. This statement clearly demonstrates that the issue had been decided before any notification to or consultation with the Union.

However, assuming that this is not the case, it cannot be said that Respondent bargained to impasse before it eliminated the Christmas lunch because, as noted above, an employer may not claim that impasse has occurred if it has been bargaining in bad faith.[126] Therefore, as I have found that Respondent had been bargaining in bad faith at all times since at least November 18, 1980, Respondent may not take advantage of the ''impasse'' defense.

Finally, I would point out that, assuming the matter had not been decided before Hubert spoke to Virag, and further assuming that Respondent had not been bargaining in bad faith on other issues, I would nevertheless find that Respondent had not bargained in good faith on this issue. When Virag ''bargained'' with Hubert he offered only sham reasons for not continuing the past practice of Christmas lunches. Employees who were then on layoff would not have been hurt by granting the others a paid half-hour extension of the lunch period on December 23, 1981, if that is what Virag meant to imply. Moreover, there is no evidence that Respondent's ''situation within the marketplace'' would have been any more imperiled in 1981 than it was in the preceding 4 years that a Christmas (or Thanksgiving) paid lunch period was granted.

Accordingly, I find and conclude that by unilaterally eliminating the practice of granting employees a paid one-half hour extension of the employees' lunch period on the last working day before Christmas, Respondent violated Section 8(a)(5) and (1) of the Act.

h. *Dental insurance premium*

The complaint alleges that on January 12, 1981, Respondent unilaterally instituted a practice of requiring employees to pay premiums for employee-only coverage.[127] It is undisputed that before the advent of the Union, employee-only, as contrasted with employee-and-dependent (or ''family'') dental coverage, was paid entirely by Respondent.

On November 19, Diederich informed Painter that Respondent had received notice that dental insurance premiums had been increased, effective January 1, 1981. Diederich proposed to Painter that Respondent pay 80 percent of the increase in employee-and-dependent coverage, as it had always done; this would increase the premium cost to employees for that coverage to $5.08. Additionally, Diederich proposed that employee contribution for employee-only coverage be raised ''from zero to 1.61.''[128] Diederich gave as a reason for his proposal that making all employees share in the cost of coverage would cause employees to hold cost down. Painter counterproposed that Respondent pay all costs of both type of coverage. Diederich responded to Painter that he had Respondent's proposal, and absent agreement to the contrary before then, Respondent intended to put it into effect on January 1, 1981.

When Miller returned to the bargaining sessions on December 2, Diederich repeated what he told Painter, and Miller repeated Painter's reply. No change was made in either party's position. On January 5, 1981, by memorandum of that date, Respondent notified all employees that, effective January 12, the cost of employee-only coverage would become $1.61 and family coverage, $5.08.

As stated above, unilateral action was permissible only if impasse had been reached, but impasse is impossible in a context of bad-faith bargaining, even if the bad faith of the employer is demonstrated only by its bargaining on other topics.[129] Here, Respondent had been engaged in a course of overall bad-faith bargaining since November 18, 1980, when it unilaterally instituted a requirement of employee contribution to employee dental coverage on January 12, 1981. Therefore, while absent this course of bad-faith bargaining Respondent would have been entitled to institute its proposal on dental insurance,[130] this is not the context in which Respondent's proposal was made and implemented.

Accordingly, it must be held that Respondent violated Section 8(a)(5) and (1) of the Act when, on January 12, 1981, it unilaterally implemented its proposal that employees be required to contribute to employee-only dental coverage.

i. *February 1981 wage increase*

The complaint alleges:

---

with Virag, as Virag's letter invited. I find that claimed loss of memory incredible. Moreover, neither Dickens nor Hassara were called in rebuttal to refute Virag on this point. Therefore, I have credited Virag.

[126] *Shipbuilders v. NLRB*, supra and cases cited therein.

[127] This allegation is to be factually distinguished from the previously discussed allegation that Respondent unilaterally *increased* premiums for family medical coverage; employees had always shared the cost of that coverage.

[128] I disagree with the contention of Charging Party that Diederich misrepresented Respondent's past practice regarding employee-only dental/cov-erage. By saying, each time it was discussed, that he proposed that coverage be increased from ''zero to $1.61,'' Diederich was acknowledging that he was proposing to institute a contribution for employee-only coverage.

[129] *Shipbuilders v. NLRB*, supra, and cases cited therein.

[130] Cf. *Taft Broadcasting Co.*, supra.

> On a date not known to [General Counsel], Respondent discontinued its policy of wage increases, which increases were customarily given during the month of February of each year, and which should have been, but were not, given during February 1981.

Respondent admits that it did not give any unit employees wage increases in February 1981. It denies, however, that it had a policy of February wage increases; it contends that its policy was to give wage increases only in August, and, therefore, it had no duty to bargain with the Union before denying February 1981 wage increases to employees. Alternatively, Respondent argues that it bargained to impasse over its proposal not to grant any wage increases that month.

The plant opened in April 1977. According to information Virag submitted by memorandum to the Union on February 10, 1981, Respondent granted wage increases to the employees in four classifications (assemblers, custodians, adjusters, and material handlers) on the following dates: July 31, 1977; January 30, 1978; July 31, 1978; January 29, 1979; July 31, 1979; February 4, 1980; August 4, 1980.[131] According to other information submitted to the Union, on April 28, 1981, Respondent employed 513 employees; 477 of these, or 93 percent, were then in the four classifications affected by the seven wage increases. Maintenance mechanics (in which classification there were five employees on April 28, 1981) were reviewed on a merit basic at times not specified by Virag's February 10 memorandum; in addition, they received up to 25 cents on a merit basis and 50 cents on a nonmerit basis when production employees received increases on February 4, 1980, and they received 40 cents when production employees got 25 cents, nonmerit, on August 4, 1980. According to that memorandum, the remainder of the employees were reviewed according to a schedule for technical and office employees. Just what review increases these other employees received was not shown at the hearing.

Respondent argues that wage increases were not given to all unit employees in each of the three February's before 1981; not all classifications were included in the increases; and for each classification Respondent was permitted a degree of discretion.

While Respondent denies that all unit employees received all February raises, it never specifies which employees did not receive them, other than to say that employees who were probationary and who were not in the classifications of material handlers, assemblers, custodians, and adjusters did not receive the increases. Since, according to General Counsel's Exhibit 104 and Virag's testimony, there was a layoff of 128 probationary employees on December 23, 1980, it is unlikely that there were any probationary employees left on February 1, 1981. Also, as observed above, 93 percent of the unit employees fall into the four classifications, and the maintenance mechanics did receive a nonmerit increase in February, 1980. Moreover, on or shortly after October 24, 1979, the following memorandum was posted at the Sioux Falls plant:

> TO: SIOUX FALLS EMPLOYEES
>
> The company is pleased to announce that the six-month performance review program will be continued through calendar year 1980. As in the past all Sioux Falls employees will have two performance reviews; the first will be in February, 1980 and the second in August, 1980.
>
> The company, within the limitations of the government guidelines, plans to provide salary adjustments that are fair and equitable for our employees. As in previous reviews, your performance will dictate your individual adjustment.
>
> This is part of our continuing commitment to our employees to remain competitive with the Sioux Falls community.
>
> (signed) J. H. Conley

Conley is Respondent's divisional vice president of consumer operations. The lack of qualification in Conley's memorandum to all ''Sioux Falls Employees'' belies any contention that less than all employees were going to be reviewed, or that less than all employees were to receive increases in February 1980.

However, if any employees were to be denied that raise, or any other of the previous February increases, Respondent assuredly had the records to prove it. I draw an adverse inference from Respondent's failure to produce such records,[132] and reject its contention that some unit employees did not get the prior February wage increases.

Respondent contends that despite the fact that February increases were, in fact, given to the employees in the four classifications which comprised over 90 percent of the unit, and despite the fact that employees were never told that Respondent had a policy of granting only August wage increases, Respondent had such a policy. In support of this argument, Respondent relies on testimony of Division President Wayne Bledsoe. Bledsoe testified that before the February 1979 and 1980 wage increases were given he was prevailed upon by subordinates to grant exceptions to Respondent's policy of granting only August wage increases.[133] According to Bledsoe he reluctantly agreed to the February increases but, both times, told the subordinates that he would not agree to February increases again.

Aside from the fact that Bledsoe's testimony does nothing to explain why the employees were granted a wage increase in February 1978 if ''Division policy'' was otherwise, Bledsoe paints the absolutely incredible picture of the tail wasging the dog. Bledsoe is chief executive of the Microwave Cooking Products Division of Litton Industries which is comprised of the Minneapolis and Sioux Falls plants. Indi-

[131] The formulas for the increases for all four classifications were: a minimum of 2 cents, and a maximum of 3 cents hourly increases for each month of service before the effective dates of the first three increases. The same range plus an additional 2 cents was granted for the raises of January 2 and July 31, 1979. The February 4, 1980 wage increases was 20 to 50 cents in nonmerit raises and an additional 10 to 25 cents in merit raises. The August 4, 1980 raise was 25 cents in nonmerit increases.

[132] *Automobile Workers (UAW) (Gyrodyne Co.) v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).

[133] When asked on direct examination what he told his subordinates, Bledsoe testified:

> I said, ''Why a February increases, or why an increase twice a year and the other locations where we were was once a year? They were on an annual basis. The Division policy was to grant increases on an annual basis.''

Since the Microwave Cooking Division consists only of the Minneapolis plant in addition to Sioux Falls, there were no other ''locations,'' (plural). Moreover, if there was a ''Division policy'' which covered *the* other location, Minneapolis, it has been superceded by the labor agreements which have covered the employees there.

viduals do not attain and retain such positions of responsibility being led around by subordinates on such a vital issues as wages. In summary, Bledsoe was absolutely incredible,[134] and I firmly believe, and find, that the ''August only'' policy simply did not exist before bargaining sessions began.[135]

However, assuming that Bledsoe's testimony was not false and that the ''August only'' policy existed before bargaining began, Respondent's board room deliberations do not determine the issue. What the employees have known and what they reasonably have come to expect determines whether an issue requires bargaining. As stated by the Board in *Liberty Telephone*, 204 NLRB 317, 318 (1973), terms and conditions of employment over which bargaining is required include:

> the normal foreseeable expectations arising out of the relationship including the *expected weekly wage*, the usual promotion policy, anticipated wage increases, customary bonuses and vacation, and other announced or *expected benefits* which constitute the terms and conditions of employment. (Emphasis supplied.)

Therefore, although a February wage increase, or review, had not expressly[136] been announced for 1981, it assuredly had been reasonably anticipated by the employees from Respondent's prior grants of February wage increases in all prior years that the plant had been opened. This expectation which Respondent fostered by its own conduct gave rise to an obligation on the part of Respondent to bargain in good faith before making changes in this term and condition of employment.[137] Therefore, it must be concluded that Respondent had an established policy of wage reviews and raises in February of each year, and it was obligated to bargain in good faith to impasse with the Union before making any change in that policy.

My previously expressed conclusion that at all times after November 18, 1980, Respondent failed and refused to bargain in good faith precludes a holding that Respondent bargained to impasse before it refused to pay the February 1981 wage increase, and a holding that Respondent violated Section 8(a)(5) and (1) by withholding those wage increases is compelled.[138] However, even assuming that Respondent bargained in bad faith on no other issue, I would find that Respondent refused to bargain in good faith on this issue and that its conduct affected all bargaining on wages.

I believe, and find, that the ''August only'' wage increase policy was created ad hoc for the purpose of deluding the Union at the bargaining table. The increase was not given because Respondent was withholding the expected wage increase as bargaining leverage, not because of any ''Division policy'' (as Bledsoe claimed), or ''corporation policy (as Diederich claimed), and the Union knew it. Therefore, the Union was placed in the position of fatuously accepting Diederich's false representations of an ''August only'' wage review policy or continuing in demands which Respondent could, as it did, characterize as ridiculous. While the Union demands were high, they were not as high as Respondent made them out to be, given the fact that they incorporated the wage increase that Respondent was unlawfully withholding. This tactic took the Union's demand out of perspective and necessarily impeded the progress of wage negotiations. However, since the issue of wages is at the epicenter of the employment relationship, Respondent's ''August only'' artifice necessarily permeated all aspects of the bargaining.

Therefore, I conclude that Respondent's withholding of the reasonably anticipated February 1981 wage increase was a unilateral action in violation of Section 8(a)(5) and (1); and I further conclude that Respondent's employment of the ''August only'' bargaining tactic is further evidence that it bargained without intent to reach any agreement with the Union.

j. *Cafeteria and patio meetings*

During the warmer months of the year employees eat their lunches on picnic tables in a patio area in front of the plant, as well as in the cafeteria. The complaint alleges that sometime in August 1981, Respondent unilaterally imposed a rule ''prohibiting employees from meeting to discuss Union matters'' in the cafeteria and patio area during the employees' lunch periods.

On January 21, 1981 (session 17) Diederich told Miller that the union employees, especially Mark Hubert, were ''taking over'' the cafeteria by loudly (and sometimes profanely) conducting meetings. Diederich stated that the union employees' conduct disturbed those wishing to eat their lunches in peace and some employees had complained. Miller insisted that the employees had a right to do what they were doing. After some discussion, as he testified, Diederich told Miler:

> I am telling you now that we are going to implement a rule that you can't take over the cafeteria and have formal structured meetings. . . . And I said, if people persist in doing it, they are going to be subject to discipline up to and including discharge.

Diederich assured Miller that Respondent was not seeking to prohibit employees from talking about anything they wished—as long as it was not in ''formal structured meetings.'' After the bargaining session, Miller told the employees to announce a meeting in the middle of the cafeteria, then gather interested employees off to the side in an attempt not to disturb others. This was the practice followed by the union employees, and the matter was not discussed again in bargaining sessions.

On July 29, after he observed union representative John Lambiase talking to employees on the patio, Virag sent a letter to the Union announcing that employees conducting

---

[134] Additionally, Bledsoe was evasive when pressed for his knowledge of which employees were covered by the February 1979 and 1980 increases and how much the increases were to be.

[135] If such a policy had existed before its announcement by Diederich (who enlarged it to a ''corporate policy'' at the bargaining sessions), it assuredly would have been memorialized in some form or fashion. Respondent failed to produce any such documentation.

[136] Conley's announcement of the 1980 wage increase which referred to ''the'' 6-month performance review program clearly implied that the past February increases were the product of an ongoing policy.

[137] *Liberty Telephone*, supra; *Electric-Flex Co.*, 228 NLRB 848 (1979), enfd. 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978); *General Motors Acceptance Corp.*, 196 NLRB 137 (1972), enfd. 476 F.2d 859 (1st Cir. 1973), in which case merit reviews involving exercise of management discretion were involved; and *Chevron Oil Co.*, 182 NLRB 445 (1970), enf. denied on other grounds 442 F.2d 1067 (5th Cir. 1971), where the reasonable anticipation of the unit employees had been derived, not from an expressed announcement of a scheduled benefit, but from the employer's established policy of granting wages in line with industry-wide agreements.

[138] *Shipbuilders v. NLRB*, supra, and cases cited therein.

''semi-formal or structured'' meetings in the cafeteria or patio area would be subject to discipline, including discharge, and nonemployees who conducted such meetings on the patio areas would be subject to arrest for trespassing. The letter concluded that Respondent did not intend to prohibit ''normal discussion about any subject among employees, nor do we intend to prevent your representatives from visiting with employees in the lunch area immediately in front of the plant during lunch or break periods.'' Respondent posted a corresponding notice of these rules to employees on July 31.

It is undisputed that the only discussion about ''structured'' meetings had been the one concerning cafeteria usage at the January 21 session. There had been no discussion of such rules as they pertained to the patio before Virag', letter and notice to the employees.

Respondent argues that its rules were necessary to protect the rights of employees and nonemployees to use the lunchroom and patio areas to eat in peace. While such argument would have supported Respondent if it had been advanced in a good-faith bargaining, this does not detract from the fact that there was no bargaining to impasse before the Respondent made the matter a subject of discipline. Respondent's bargaining in bad faith after November 18 1980, precludes any finding of impasse over the rules as they applied to the cafeteria.[139] Moreover, there was absolutely no discussion of meetings on the patio before implementation of the rule against them.

Accordingly, I find and conclude that Respondent's unilateral implementation of the disciplinary rules announced on July 29 and 31 violated Section 8(a)(5) and (1) of the Act.

k. *August 3, 1981 changes*

It is undisputed that Respondent, on August 3, 1981, implemented changes in the areas of wage rates, night shift premium, accident and sickness insurance coverage as it related to paid time off, and rates paid for medical insurance coverage.[140] Again, Respondent contends that these changes were consistent with its last proposal on each item and made only after it bargained in good faith to impasse; therefore, no violation can be found under the theory of *Taft Broadcasting*, supra.

However, as I have repeatedly noted above, the defense of impasse is not available to an employer who which has bargained in had faith, as Respondent had done since at least November 18, 1980. Accordingly, I find and conclude, that as alleged, Respondent violated Section 8(a)(5) by reason of the Act by unilateral changes made on August 3, 1981.[141]

3. Alleged refusals to furnish information

a. *Wage information*

The complaint alleges that Respondent furnished the Union wage information which was conflicting and inaccurate.

On September 23, 1980, Miller sent a letter to Virag asking for certain information including:

> (1) A list of all bargaining unit employees by classification, showing their seniority dates and current rates of pay.
>
> (2) A list of all jobs in the bargaining unit, the top rate for each job, the progression schedule for reaching the top rate, and job descriptions.

By letter of September 29, Virag responded to the first request with a statement that the information would be sent as soon as possible. For the second item Virag stated:-

> Attached is a list of all the jobs in the bargaining unit showing the top rate of pay. We do not have a progression schedule and current job descriptions are not available.

Attached to this letter was a two-column schedule. The first column was headed ''UNIT JOB CLASSIFICATION'' below which was listed the various classifications; the second column was headed ''TOP RATE OF PAY (9-30-80),'' below which was listed a single rate for each job classification. For assemblers, who made up over 90 percent of the unit, the ''top rate'' was listed as $4.70. There was no mention of ''red circles'' in the letter, and none was made until bargaining session 17 on January 21, 1981. This discussion came about when Miller was questioning information furnished at that date which indicated that the maximum rate for labor grade 21, in which all assemblers were placed, was $4.49 per hour. ''When Miller asked how the rates for assemblers could have gone down, Diederich stated that assemblers who had been receiving more than $4.49 per hour had been ''red circled'' at a-higher rate.

If any employee had ever been told that he had been ''red circled,'' there is no evidence of it in the record. Moreover, if Respondent had any documentation that employees had been given raises beyond that allowed for the classification in which the employees' jobs had been was placed, it was not produced at the hearing. Certainly, if any such evidence had existed, it would have been produced. Even more certain is the fact that if any ''red circles'' had existed, Virag would have so stated in his letter of September 29; instead he stated without qualification that the ''top rate'' for assemblers was $4.70. Diederich attempted to explain away Virag's letter by stating that Respondent did not know whether Miller's request had been for the maximum of each classification, or the maximum that any employee in a classification was receiving. Miller had no reason to believe there was a difference; he had never heard of ''red circles'' at the plant before. If there was a difference, it was incumbent on Virag to have so stated in his letter of September 29.

I do not believe there was a difference. I believe that the ''red circle'' response was another ad hoc creation designed to delude the Union. The effect of the ploy was to enable Respondent to take out of perspective any wage demands made by the Union in subsequent negotiations. By falsely claiming that assemblers were in a classification the maximum rate of which was $4.49, when, in fact, it was $4.70 (according to the plain meaning of Virag's letter of September 29), the Union's wage demands were cast in a light of including a raise of 21 cents, when it simply was not true. Conversely, the ploy made Respondent's subsequent offers to be greater than they really were because Respondent was

[139] Id.

[140] Contrary to the allegation of the complaint, Respondent did not effectuate any change in the group leader premium; this remained 10 percent over the current job rate of the employees being led.

[141] *Shipbuilders v. NLRB*, supra and cases cited therein.

falsely representing the previous maximum wage rates of the classification of the unit employees.

In summary, I believe and find that the information submitted to the Union on January 21, 1981, was false, and I conclude that this action was a further violation of Section 8(a)(5) of the Act.

b. *Tour*

The complaint alleges that Respondent failed to furnish the Union information by denying Miller a tour of the plant after a request made on October 7, 1980. Respondent admits that it had a duty to give the union representative, upon request, a tour but denies that there was a specific request for a tour until the Union made one in writing on July 10, 1981.

Throughout the hearing, and in its brief, Respondent attempted to distinguish Miller's many statements that he would ''like'' a tour from a request for a tour. The question immediately arises: why would Miller have even mentioned a tour if he was not requesting one? On cross-examination Diederich acknowledged that his written summary of the October 7 bargaining session states: ''Joe [Miller] and Dennis [Painter] want to tour plant sometime when convenient for Company. Have chief steward and President along.'' Diederich testified that this was only an ''aside'' by Miller after he had read his proposal on visitation rights of the union representative (during the proposed contract term), and not ''something that I interpreted as a request.'' Therefore, Diederich did not respond to Miller.

Respondent does not: dispute that the Union's letter of July 10, 1981, was a sufficiently specific request. In that letter, Miller stated:

> Pursuant to our request I am asking that U.E. Field Organizer Kathy Laskowitz, one of the Chief Stewards and myself be allowed to tour the Sioux Falls plant at your earliest convenience.

There is no meaningful difference between the written and verbal requests. Diederich perfectly well knew that at all times after October 7 the Union wanted to have a representative tour the plant,[142] and Respondent's delay until after the July 10, 1971 letter requesting the tour was a delay in furnishing information in violation of Section 8(a)(5) of the Act.[143]

c. *Other requested information*

The complaint further alleges that Respondent refused to furnish, or delayed in furnishing, other information in 1981; to wit: the names of employees hired after June 1, as requested on July 27; names and addresses of employees hired after May 1, as requested on August 31; names of employees terminated after June 1, as requested on July 27, dates of hire of employees hired after June 1, as requested on July 27; cost of the sickness and accident program implemented on August 3, as requested on September l; a list of employees who had been discharged after being on workers compensation for a period exceeding 12 months (during an unspecified period), as requested on September 11; and ''the names and seniority dates of employees who bid on job postings or otherwise indicated an interest in a job promotion during the preceding month and who were awarded such promotions,'' as requested on August 31.

Virag testified about the receipt of each of these requests and the delays encountered in compiling the information. He further testified that Respondent ultimately furnished the Union all the requested information which existed. Virag's testimony was credible, and neither Charging Party nor General Counsel make the slightest suggestion of why Virag's explanations were inadequate.

I do not find the explanations for the delays inadequate, and accordingly recommend that these final allegations of the Complaint be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead labor disputes, burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent is engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act. Having found that Respondent violated Section 8(a)(5) of the Act, I shall order Respondent, upon request, to meet with the Union and bargain collectively concerning rates of pay, hours of employment and other terms and conditions of employment of employees in the unit found appropriate herein, and, if agreement is reached, embody it in a signed contract.

By withholding the February 1981 increases from the employees, Respondent has unlawfully deprived unit employees of such wages. In order to make them whole the Respondent shall pay to all bargaining unit employees the increases which would have been payable beginning February 1, 1981, including backpay and interest for such unpaid increases, and shall maintain such increases in effect until such time as a new agreement is negotiated with the Union, or until the parties have bargained in good faith to an impasse. The amount of such wage increases may be determined at the compliance phase of this proceeding.

Having found that Respondent has violated, and is violating, Section 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[142] I have previously quoted Diederich's testimony that he considered Miller's statement a request but he thought no more of it than if two old friends had accidentally met and agreed to have a drink some time, but they never do. This was not the relationship of the Respondent and the Union, and it was not the circumstance under which they met.

[143] I reject the further contention of the Charging Party that the time allowed Laskowitz for the tour after July 10 was inadequate. There was no testimony by Laskowitz or any other union representatives who took subsequent tours that the time allowed was inadequate.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Sioux Falls, South Dakota, facility, including leadpersons, assemblers, adjusters, manufacturing technicians, shipping and receiving clerks, material handlers, schedulers, production control coordinators, dispatchers, cycle counters, locator clerks, inventory coordinators, inventory analysts, inventory clerks, engineering change notice analysts, receiving inspectors, senior receiving inspectors, R.F. meter checkers, quality control technicians, auditors, manufacturing engineering technicians, new models coordinators, mechanics, tool crib clerks, and custodians; excluding office clerical employees, professional employees, and guards and supervisors as defined in the Act.

4. At all times material herein the Union has been the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3 of this section.

5. Respondent has violated Section 8(a)(1) of the Act by the following acts and conduct:

(a) Moeller's directive to Hubert to cease soliciting ''on Company time,'' and promulgating a discriminatory no-solicitation rule by that action;

(b) Kozel's interrogation of Dunkelburger;

(c) Klaus threatening Jungen with discipline for engaging in protected concerted activity;

(d) Abraham discriminatorily instructing Dickens not to discuss the Union on the production floor during at any time; and

(e) Abraham discriminatorily instructing Roe not to discuss the Union on the production floor at any time.

6. Respondent has violated Section 8(a)(3) and (1) of the Act by issuing warning notices on April 21, 1981, to employees July Lawson, Mark Hubert, and John Hassara, and by issuing warning notices to Lawson and Hubert on April 22, 1981, because the employees engaged in union and protected concerted activity.

7. Respondent has, by its conduct since November 18, 1980, refused and continues to refuse to bargain collectively in good faith concerning wages, hours of employment, or other terms and conditions of employment for the employees in the unit described above, in violation of Section 8(a)(5) of the Act. More particularly, Respondent has negotiated in bad faith, or without intent to reach an agreement on a contract embodying the terms and conditions of the employees in the unit found appropriate herein, by the following acts and conduct:

(a) By maintaining an overall intent not to reach agreement with the Union;

(b) By refusing to negotiate on the issue of checkoff;

(c) By insisting on an unlawful ''zipper'' clause which required the Union to waive all rights under all statutes;

(d) By insisting on the unusually harsh provisions of its ''no fault'' absence control program;

(e) By insisting on including in any contract a term which was a mandatory subject of bargaining; to wit, expression of its right to review of Board unit placement decisions in the courts of appeal;

(f) By providing false and misleading reasons for its wage proposals, by representing that it had a Divisional or Corporate policy of granting wage increases in August only and a prior practice of ''red circling'' employees' wage rates when such representations were not true;

(g) Unlawfully taking unilateral actions, or actions without notice to and bargaining with the Union on the following topics; the length of break and lunch periods; paid Christmas lunch periods; dental insurance premium; a wage increase in February 1981; rules regarding the holding of meetings on nonworking time in nonworking areas; wage rates; night-shift premium; accident and sickness coverage as it relates to paid time off, and rates paid for medical insurance coverage; and

(h) By refusing to furnish information to the Union by providing false and misleading wage information and refusing to grant the union representatives a tour of Respondent facilities.

8. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. All other allegations of the complaint are without merit, including specifically the allegations that Respondent unlawfully suspended, then discharged, employees Judy Lawson, Laurie Bachtell, and Hubert and Bernie Sterud.

[Recommended Order omitted from publication.]